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No. 94-

In The
Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHVIEW FARM AND RICHARD H. POPP,
Petitioners,

v.

CONCERNED AREA RESIDENTS FOR
THE ENVIRONMENT, *et al.*, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a dairy farm that uses its animal manure to fertilize its feed crop fields is a "concentrated animal feeding operation" and thus a point source subject to the permit requirements of the Clean Water Act.

2. Whether liquid manure washed off farm fields by a rainstorm is an "agricultural stormwater discharge" exempt from the Clean Water Act's definition of point source.

3. Whether manure-spreading equipment or a depression in a farm field, neither of which directly discharges pollutants into navigable waters, is a point source subject to the permit requirements of the Clean Water Act.

RULE 29.1 STATEMENT AND PARTIES TO THE PROCEEDING

Petitioner Southview Farm has no parent or non-wholly owned subsidiary corporations.

In addition to the party named as respondent in the caption, the following persons were plaintiffs-appellants below and are respondents here: Philip Karcheski and Kathleen Karcheski, individually and as parents and legal guardians of Brian Karcheski and Robyn Karcheski, infants; Lois E. Link; Daniel L. Wilson; William A. Fagan; Betty C. Fagan; Jeffrey Ferris and Linda Ferris, individually and as parents and legal guardians of Chad J. Ferris, Stacey P. Ferris, and Shawn W. Ferris; and Kirk Schroeder, individually and as parent and legal guardian of Stacy L. Schroeder, Kirk Bly and Vickie Bly.

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The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 34 F.3d 114. The opinion of the district court (App., *infra*, 23a-54a) is reported at 834 F. Supp. 1422.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1994, and a timely petition for rehearing was denied on November 3, 1994. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory and regulatory provisions relevant to this case are set forth at App. 55a-57a, *infra*.

STATEMENT

This case involves a judicial override of federal legislation exempting commonplace agricultural activities from the permit requirements of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.* A jury found that petitioner Southview Farm ("Southview") had violated the CWA by failing to obtain a permit before fertilizing its feed crops with liquid manure that eventually found its way into navigable waters. The district court thereafter granted Southview judgment as a matter of law, holding that plaintiffs had failed to show that the discharges in question emanated from a point source and thus required a permit under the CWA. First, the court ruled, Southview falls outside the regulatory definition of a "concentrated animal feeding operation" ("CAFO")—the only type of agricultural operation included by Congress within the definition of point source—because it raises feed crops and therefore is covered by the CWA exemption for large livestock farms that grow crops or forage on any part of the farm facility. Second, a number of the discharges in issue were "agricultural stormwater discharges," which Congress specifically exempted from the definition of point source.

In an opinion written by Judge Oakes, the Second Circuit reversed. The court of appeals construed the definition of a CAFO so narrowly that a large dairy farm would have to grow crops *inside* its cattle barns to qualify for the CWA exemption for livestock operations that raise crops or forage, effectively destroying that exemption. The court also read "agricultural stormwater discharges" to mean only *pure rainwater*, thereby rendering Congress' exemption inapplicable to any agricultural stormwater, which invariably includes other matter. Finally, the Second Circuit detected

indirect point sources at Southview in the form of manure spreaders and a depression in a field. In reality, this is a case in which a court of appeals, in a burst of environmental zeal, decided that Congress was too soft on agricultural pollution and re-wrote the law to satisfy its own preference for broader federal regulation than Congress thought desirable.

As we demonstrate below, Congress was well aware that water pollution may emanate from agricultural nonpoint sources. It nevertheless made a deliberate policy choice that the states, rather than the federal government, should bear primary responsibility for addressing such pollution. Congress recognized that diffuse discharges of the type alleged here are difficult and costly for the federal government to regulate, requiring flexible and site-specific oversight that local authorities are better able to administer, and that American agriculture would be severely harmed by imposition of the CWA's permitting regime.

The Second Circuit's revision of the CWA's scheme of regulation threatens American farmers with a new layer of costly and burdensome federal regulation not intended by Congress. If the court of appeals' decision stands, farmers will have to seek a federal permit before applying fertilizers, including recycled animal wastes such as those used by Southview, to their fields. They will also have to comply with the manifold requirements associated with the CWA's permit program, designed to control industrial and municipal—not agricultural—wastes. Added costs, in the form of permit applications, compliance expenses, CWA penalties, and legal fees, for common and necessary fertilization performed on a routine basis by farmers throughout this country, would further squeeze farmers' already limited profits and could in some circumstances render dairy and livestock farming economically unviable.

A court may not, consistent with the constitutional principle of separation of powers, reregulate an area that Congress has chosen to deregulate. As this Court noted in reviewing a prosecution under the Rivers and Harbors Act, this country's water pollution problems do not "warrant us in manufacturing offenses where Congress has not acted." *United States* v. *Standard Oil*, 384 U.S. 224, 225 (1966). This Court should grant certiorari to prevent a judicial override of Congressional policymaking on issues of fundamental importance to this nation's agricultural industry.

A. The Statutory Framework

A description of the facts in this case requires an initial overview of the statutory framework. The Clean Water Act originated in the Federal Water Pollution Control Amendments of 1972, 86 Stat. 816, codified as amended, 33 U.S.C. § 1251 *et seq.*, which imposed effluent limitations on point source discharges through a federally mandated and supervised permit system, the National Pollution Discharge Elimination System ("NPDES"). 86 Stat. at 883, codified as amended, 33 U.S.C. § 1342. Section 208 addressed *nonpoint* sources through a planning process that placed primary responsibility on the states. 86 Stat. at 839, 33 U.S.C. § 1288. The statute was renamed the Clean Water Act in 1977.

The CWA makes unlawful, absent a permit, "the discharge of any pollutant." 33 U.S.C. § 1311(a). A "discharge" is "any addition of any pollutant to navigable waters from any point source." *Id.*, § 1362(12). A "point source," in turn, is defined to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.*, § 1362(14). A point source specifically "does not include agricultural

stormwater discharges and return flows from irrigated agriculture." *Ibid.*

A "concentrated animal feeding operation" or CAFO—which is a particular type of point source—is not defined in the statute. It is defined in the implementing regulations as an animal feeding operation ("AFO") that meets the criteria of Appendix B, that is, contains more than 700 mature cattle. 40 C.F.R. § 122.23(b). An AFO, in turn, is "a *lot* or *facility* * * * where * * *

> (i) Animals * * * have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and, (ii) *Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.*"

Id. at § 122.23(b)(1) (emphasis added). The Environmental Protection Agency ("EPA") has further specified that the definition of a CAFO "does not include areas of the facility where crops or forage crops are maintained throughout the growing season." 58 Fed. Reg. 7610, 7616 (1993).

The phrase "agricultural stormwater discharge" is not defined in either the statute or regulations. "Stormwater," however, is defined in regulations governing industrial and municipal discharges as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). And the EPA recently defined stormwater, in the course of explaining changes in CAFO permits, as "runoff caused by rainfall, snowmelt, or drainage which flows overland instead of percolation into the soils due to saturation." 58 Fed. Reg. 7610, 7614 (1993).

B. Factual Background

Petitioner Southview, which is managed by petitioner Richard H. Popp, is a large dairy farm in Castile, in upstate New York's Wyoming County. It has approximately 1,290 milking cows and 900 calves and heifers, primarily housed in barns. Southview grows food for its herd, including alfalfa, clover, corn silage, and grasses, in fields that abut the barns and that are an integral part of the farm and its operations. Instead of relying exclusively on chemical fertilizers, Southview recycles its own cow manure. After the manure is filtered through a liquid/solid separator, the liquids are stored in a lagoon. The liquid manure is then pumped from the lagoon into tank spreaders or a spray pivot system, which apply it directly onto Southview's crop fields. App., *infra*, 3a-4a.

Plaintiffs, an ad hoc group of local residents, brought a citizen's suit against Southview under the CWA. They alleged that on occasion between 1989 and 1991 some of the liquid manure applied to Southview's fields had eventually entered local waterways, in violation of CWA § 1311(a), which requires a federal permit for "the discharge of any pollutant." After denials of defendants' motions to dismiss and for summary judgment, eleven alleged CWA violations were submitted to a jury. The jury returned a verdict in favor of plaintiffs on five of those, finding violations on July 12, 1989; July 13, 1989; August 22, 1989; September 26, 1990; and April 15, 1991.

C. The District Court's Decision

The district court subsequently granted defendants judgment as a matter of law on all five alleged CWA violations. App., *infra*, 54a. The district court determined that Southview did not violate the CWA because it was not a point source of the alleged pollution. Because the CWA applies only to discharges from a point source, the court could not, as a matter of law, sustain the verdict.

With regard to the July 13 date, the court held that Southview could not be liable because the alleged discharge had not been from a point source but from "diffuse runoff," which is "not the sort of pollution that Congress intended to be covered by the Act." App., *infra*, 45a. As to the September 26 and April 15 dates, the court found overwhelming evidence that the manure had been washed off Southview's fields by heavy rains, making the occurrences "agricultural stormwater discharges" exempted by Congress from the definition of a point source in 1987. *Id.* at 35a-36a. Regarding the July 12 and August 22 dates, the district court found insufficient evidence that there had been any discharges at all, so that the jury's finding was "sheer surmise and conjecture." *Id.* at 28a.

Finally, the court held that Southview is not a CAFO point source because it grows crops on its facility, taking it out of the regulatory definition. App., *infra*, 36a n.6.

D. The Court of Appeals' Decision

Reversing, the Second Circuit rested its conclusion that all five discharges emanated from a point source on its holding that Southview is a CAFO and not subject to any agricultural exemption. App., *infra*, 20a. To begin with, the court ruled that the regulatory exemption from the definition of CAFO for a "lot" or "facility" on which crops are grown did not apply here. It was able to reach this conclusion only by defining "facility" extremely narrowly as the barns in which the cattle were kept rather than as the farm as a whole. The court thus held that the exemption would apply only if Southview's crops were grown "in" the barns, rather than, as was the case here, "adjacent" to them. *Id.* at 18a-20a.

In addition, the court of appeals held that the statutory exemption for agricultural stormwater discharges did not apply to the September 26 and April 15 occurrences, as the district court had concluded, because "there can be no escape

from liability for agricultural pollution simply because it occurs on rainy days." App., *infra*, 13a. The court of appeals also found that Southview failed a test—one of the court's own invention and not based on any statutory language—according to which the exemption does not apply if "sufficient quantities" of agricultural pollutants are present in the stormwater runoff. *Id.* at 15a.

Finally, overriding the district court's contrary factual determinations, the Second Circuit held that there was sufficient circumstantial evidence to find that discharges occurred on July 12 and August 22, and that the discharge on July 13 did emanate from a point source—either a swale in one of the fields or, alternatively, Southview's manure spreading vehicles. App., *infra*, 12a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to review the court of appeals' serious misconstruction of the term "point source" in the CWA. In vastly expanding the reach of the CWA into American agriculture, the court of appeals effectively overruled Congress' exemption of most agricultural activities, including fertilization, from the definition of "point source" and thus from the CWA's burdensome federal permit program. In so doing, it impermissibly departed from the accepted and proper scope of statutory interpretation.

The issues presented in this petition are of critical importance to the American agricultural industry. The court of appeals' ruling threatens to add a significant new layer of regulatory costs and compliance requirements to the heavy demands already imposed upon the beleaguered agricultural sector. It imperils the livelihoods of farm and ranch families who heretofore have reasonably understood that their activities fall within Congress' carefully crafted exemptions.

I. THE SECOND CIRCUIT'S DECISION IMPERMISSIBLY OVERRODE CONGRESS' DETERMINATION TO HAVE THE STATES—NOT THE FEDERAL GOVERNMENT—REGULATE NONPOINT SOURCES OF POLLUTION

The CWA embodies a dual regulatory system for safeguarding the nation's waters from pollution. It carefully distinguishes between "point source" and "nonpoint source" pollution. The former is restricted to pollution from a "discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). The latter is not defined, but the EPA has stated that "nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from *land runoff*, precipitation, atmospheric deposition, or percolation." U.S. EPA, Office of Water, *Nonpoint Source Guidance* 3 (1987) (emphasis added).

The CWA assigns oversight over pollution emanating from point sources to the federal government and oversight over pollution emanating from nonpoint sources to the states. Thus, "[i]n 1972, the Congress made a clear and precise distinction between point sources, which would be subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments." S. Rep. No. 370, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4334. The federal government regulates discharges of pollutants from point sources by mandating technology-based standards and requiring those who discharge pollutants to obtain permits issued pursuant to NPDES. 33 U.S.C. § 1342. CWA sections 208 (33 U.S.C. § 1288) and 319 (*id.*, § 1329) direct the states to adopt measures to address nonpoint source pollution, with the details of those measures to be developed and administered by the states themselves. See *Arkansas* v. *Oklahoma*, 112 S. Ct. 1046, 1054 (1992).

Congress has taken pains to ensure that most agricultural activity is considered to be nonpoint source and hence is subject primarily to state regulation.[1] First, by defining "point source" as "a discrete conveyance," Congress automatically excluded most agricultural contamination, which "enter[s] the aquifer over a broad area, rather than from a discrete point of discharge." Sivas, *Groundwater Pollution from Agricultural Activities: Policies for Protection*, 7 Stan. Envtl. L.J. 117, 128 (1987/1988). The Senate Report to the 1972 amendments thus specifically listed as nonpoint sources "[a]gricultural runoff, animal wastes, soil erosion, fertilizers, pesticides and other farm chemicals that are a part of runoff." S. Rep. No. 414, 92d Cong., 1st Sess., *reprinted in* 1972 U.S.C.C.A.N. 3668, 3705.

Second, Congress has consistently exempted agricultural livestock operations from the requirements imposed on point sources, excepting only CAFOs. See 33 U.S.C. § 1362(14); S. Rep. No. 414 at 3759 (supplemental views of Sen. Dole) ("Most of the problems of agricultural pollution deal with non-point sources * * *; a feedlot would be considered to be a non-point source").

Third, Congress reinforced agriculture's special status by amending the CWA's definition of point source in 1977 specifically to exclude "return flows from irrigated agriculture," thereby overturning a contrary court ruling, *National Resources Defense Council* v. *Train*, 396 F. Supp. 1393 (D.D.C. 1975), aff'd sub nom. *National Resources Defense Council* v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The 1977 amendments also added the Rural Clean Water

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[1] The Second Circuit has previously recognized that point sources are generally found in the context of industrial and municipal—not agricultural—discharges. *United States* v. *Plaza Health Labs., Inc.*, 3 F.3d 643, 646-647 (2d Cir. 1993).

Program, which offered financial incentives to control agricultural nonpoint source pollution. 33 U.S.C. § 1288(j).

Fourth, Congress amended the definition of point source yet again in 1987 to exempt agricultural—but not industrial—stormwater discharges. See 33 U.S.C. § 1362(14). The 1987 amendments further manifested Congress' commitment to state regulation of nonpoint sources by adding section 319 to the CWA, 33 U.S.C. § 1329, which encourages states to control nonpoint source pollution.[2] Together, these actions demonstrate that Congress regards agriculture as a special case under the CWA and as generally exempt from the federal regulation of point sources. *Cf. Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 18 (1981) (construing sections of Clean Water Act by analyzing its structure and legislative history; "courts are not authorized to ignore this legislative judgment").

The Second Circuit's decision in this case transforms Congress' dual regulatory scheme into a monolithic program of federal regulation. By construing the concept of a CAFO so broadly that all large livestock operations become point sources, and by effectively defining the "agricultural stormwater discharges" exemption out of existence, the court of appeals has engaged in the kind of "judicial legislation under the guise of construction" (*Blockburger* v. *United States*, 284 U.S. 299, 305 (1932)) against which our constitutional scheme was designed as a bulwark.

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[2] Significantly, *every* case outside the Second Circuit cited by the court of appeals to support its position was decided *before* Congress' 1987 amendments.

A. Farms Like Southview Are Not Concentrated Animal Feeding Operations And Are Excluded From The Definition Of A Point Source

The Second Circuit's reversal of the district court rests in large measure on its determination that Southview is a CAFO and therefore a point source. App., *infra*, 20a. It could reach that conclusion only by so twisting the regulatory definition of CAFO as to turn it inside out.[3]

The CWA's definition of point source is, with one exception, directed at industrial and municipal rather than agricultural polluters. S. Rep. No. 414 at 3760; U.S. EPA, Office of Water, *Managing Nonpoint Source Pollution* 144 (1992). Except for CAFOs, "most water pollution generated by agricultural activities is nonpoint source." Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. Davis L. Rev. 461, 474 (1990). The statute itself does not define a "CAFO," but the express language and the statutory scheme outlined above strongly suggest that Congress did not intend to include conventional farms like petitioner Southview, but only factory-like operations where livestock are simply held for feeding and fattening prior to slaughter. Concentrated animal production without crop activity has long been viewed as more industrial than agricultural. See *Farmegg Prods., Inc.* v. *Humboldt County*,

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[3] The Second Circuit's error may have a simple explanation. The question whether Southview is a CAFO was never subject to adversary briefing in the court of appeals. That issue was raised for the first and only time in an *amicus* brief filed by the United States *three working days* before oral argument—well after all the parties' briefs had been submitted. The court of appeals denied Southview's motion for leave to file a supplemental brief in response to the government's new arguments. The court of appeals therefore lacked the benefit of a full exchange of views, as well as any references to the trial testimony and relevant exhibits, before determining that Southview is a CAFO.

190 N.W.2d 454, 459 (Iowa 1971) (land used for poultry production where no feed crops are grown is not for "agricultural purposes"). Accordingly, the regulatory definition of CAFO excludes lots and facilities that, in addition to maintaining livestock, also grow crops, vegetation, forage growth, or post-harvest residues. 40 C.F.R 122.23(b).

That is the sole CAFO criterion at issue here. For Southview to be a CAFO, crops or vegetation must not be grown "over any portion of the lot or facility." 40 C.F.R. 122.23(b). The use of the disjunctive "or" indicates that "facility" means something different from, and obviously broader than, "lot." And the phrase "any portion of" indisputably indicates that crop-growing need not be a major activity to remove the facility from CAFO status. Southview, it is uncontested, grows crops over a significant portion—more than 1,100 acres—of its facility, in fields abutting and surrounding the cattle barns. In consequence, it is not a CAFO.

The court of appeals was able to overcome this stubborn fact only by narrowing the broad term "facility" to mean solely the barns in which the cattle are penned. Finding that Southview grows crops on fields "adjacent" to those barns, rather than "in" the barns, the court concluded that Southview is a CAFO. App., *infra*, 18a-20a.[4] In the court's view, then, for a large livestock farm not to be a CAFO and thus not a point source, *it would have to grow crops inside its barns!*[5] Congress could not possibly have

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[4] Significantly, the term "adjacent" is not found in any of the pertinent statutory or regulatory provisions.

[5] Another option might be to keep the cows at pasture with no housing at all. But that is not practical for most of the year in cold weather climates like upstate New York and most other dairy and livestock regions. Moreover, modern dairy farms have largely

intended such an absurd qualification. The Second Circuit's extraordinarily crabbed construction would do irreparable violence to Congress' goal of leaving regulation of agricultural pollution to the states. It would transform a narrow window of direct federal regulation in the agricultural arena into an enormous expansion of CWA liability reaching all large dairy and livestock farms.

Furthermore, even EPA has acknowledged that the term "facility" is much broader than the Second Circuit believed, recently stating that "[t]he definition [of a CAFO] does not include areas of the facility where crops or forage crops are maintained throughout the growing season." 58 Fed. Reg. 7610, 7616 (1993). This statement plainly assumes that the term "facility" describes an entire farm, including crop-growing areas. It also clarifies that the crop fields—the direct source of the pollution alleged in this case—are not CAFOs and thus cannot be point sources for CWA purposes.[6] Moreover, EPA's regulations allow its Director to "designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollution." 40 C.F.R. § 122.23(c)(1). The Director has not designated Southview as a CAFO.

The court of appeals clearly was dissatisfied with the regulatory definition of CAFO. But "[t]he question * * * is

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abandoned pasturage because it cannot provide a sufficient volume of adequate nutrients for milk production.

[6] The court of appeals' ruling was based on wholly different EPA regulations that define "feed lot" in the context of setting forth effluent limitations for feed lots with NPDES permits. App, *infra*, 18a; see 40 C.F.R. § 412.12. If anything, those regulations merely illustrate the difference between the narrow concept of a "feed lot" and the much broader concept of an agricultural "facility."

not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations." *E.I. du Pont de Nemours and Co.* v. *Train*, 430 U.S. 112, 138 (1977). The definition of CAFO in the regulations is consistent with the very restricted opening provided by Congress to bring agricultural enterprises within the reach of the NPDES permit program. The Second Circuit's opinion failed to respect Congress' creation of broad exemptions to the CWA for agriculture, or even EPA's own regulations. See *EPA* v. *State Water Resources Control Bd.*, 426 U.S. 200 (1976) (court of appeals' misreading of Clean Water Act led it improperly to require federal facility to obtain state permit).

B. Congress Expressly Exempted Agricultural Stormwater Discharges From The Definition Of Point Source

Overwhelming evidence supported the district court's ruling that the discharges of September 26 and April 15 were agricultural stormwater discharges as a matter of law and thus did not issue from a point source. The uncontroverted testimony from witnesses was that manure from the Southview fields had migrated off the property after rainstorms on each of those dates. In addition, two reports prepared by the New York State Department of Environmental Conservation, admitted into evidence, stated that "heavy rain" "caused" the manure to run off the property on each of those dates. App., *infra*, 30a.[7] Thus, the district court could only conclude that "[i]f this activity does not fall within the exception for

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[7] The Second Circuit's supposition that "the run-off was primarily caused by the over-saturation of the fields rather than the rain" (App., *infra*, 15a) ignored these reports of the local on-the-scene officials and impermissibly substituted its own unsubstantiated factfinding for the findings of the district court that had heard all the evidence.

agricultural stormwater discharges, it is difficult to see what would." *Id.* at 35a-36a.

Congress specifically exempted agricultural stormwater discharges from the definition of point source in the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7. Although the legislative history provides no explanation of the term, that undoubtedly reflects the lack of any need to explain such plain language. "Agricultural stormwater discharges" is a clear enough and broad enough description to encompass any agricultural pollution picked up by rainstorm runoff. Congress did not say "some" agricultural stormwater discharges; it exempted all. The EPA understood this when it prepared its implementing regulations (40 C.F.R. § 122.3), which state:

> The following discharges do not require permits: * * * (e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands.

The runoff from Southview's "cultivated crops" fits within this exclusion. Furthermore, the EPA recently clarified the meaning of a stormwater discharge by explaining that it is "runoff caused by rainfall * * * which flows overland" rather than seeps into the soil (58 Fed. Reg. 7610, 7614 (1993))—an exact description of the occurrences at Southview on September 26 and April 15. Unsurprisingly, commentators agree that farm field runoff is not a point source. *E.g.*, Davidson, *Thinking About Nonpoint Sources of Water Pollution and South Dakota Agriculture*, 34 S.D. L. Rev. 20, 21 (1988/1989) ("runoff from land" is a nonpoint source).

Dissatisfied with Congress' blanket exclusion of agricultural stormwater runoff, the court of appeals proceeded to subclassify runoffs and to hold some to be point

sources. It ruled that if "sufficient quantities" of manure were present in the runoff, it "could not be classified as 'stormwater.'" App., *infra*, 15a. Not only did the court fail to identify how "sufficient" those quantities had to be, but it nowhere even pretended to ground its "sufficient quantities" test in the text of the statute or regulations. The Second Circuit's "sufficient quantities" test amounts to a judicial device to rescind this unqualified Congressional exemption and substitute a judge-made rule.[8]

The court of appeals ruled that "there can be no escape from liability for agricultural pollution simply because it occurs on rainy days." App., *infra*, 13a. The fact is, however, that Congress' policy judgment was precisely to the contrary—that agricultural wastes washed into navigable waters on rainy days would not be subject to CWA liability. See Davidson, *supra*, 34 S.D. L. Rev. at 36 ("the word 'stormwater' [in the 1987 amendment] describes *all* the waters that routinely drain from farm fields") (emphasis added). Recognizing that rainwater cannot travel across fertilized farm land without picking up some level of pollutants, Congress authored the term "agricultural stormwater discharges" to describe broadly such mixtures and thereby remove any disincentive to fertilize. See App., *infra*, 34a (noting that it is "virtually impossible for rain water to travel over the ground without picking up at least a minimal amount of pollutants"). The position of the Second

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[8] The court of appeals went on to urge that because *all* discharges eventually mix with precipitation runoff when they *reach* the relevant navigable waters, Congress could not have intended to exempt all such mixtures. App., *infra*, 14a. Here, the court simply mistook the relevant locus of analysis. The issue is whether the manure and stormwater mixed *on* the farm, forming agricultural stormwater, and then "discharged" into navigable waters—not what occurred *in* the navigable waters.

Circuit, if allowed to stand, would effectively wipe the 1987 agricultural stormwater discharges amendment off the books.

This petition does not rest on a circuit split over this question. In fact, the conflicting lower court opinions in this case are the only ones to have construed Congress's 1987 exemption of agricultural stormwater discharges from the definition of point source. For that very reason, the Second Circuit's revision of that amendment now occupies the field and threatens to cause severe disruption to farm and ranch interests across the nation. This Court should grant certiorari to dispel the confusion that results from that decision.

C. Neither a Depression In A Southview Field Nor Its Manure-Spreading Vehicles Were Point Sources Because Neither Discharged Pollutants Into Navigable Waters

Judge Oakes, author of the Second Circuit opinion, has previously recognized that agricultural runoff of the type at issue here is nonpoint source pollution. See *United States* v. *Plaza Health Labs., Inc.*, 3 F.3d 643, 652 (2d Cir. 1993) (Oakes, J., dissenting) ("Nonpoint source pollution is, generally, runoff: * * * agricultural chemicals from farmlands, * * * other substances washed by rain, in diffuse patterns, over the land and into navigable waters"). In this case, however, the court located point sources all over Southview's crop fields. In particular, the court held that either a swale in one of Southview's fields or, "alternatively," its manure spreading vehicles, were point sources. App., *infra*, 10a. Neither were what Congress had in mind.

A swale is nothing more than a depression in the ground—hardly the man-made discrete conveyance contemplated in the statutory definition of point source. The court's own description illustrates that any gathering of manure in the swale was much too remote from the alleged discharge to be its source. According to the court, the manure left the swale, found its way to a pipe under a

stonewall, then ran into a ditch, then ran into a stream, and eventually made its way to the Genesee River. App., *infra*, 8a. As the district court correctly determined, this meandering movement from "low spots" on the Southview Farm took place "in too diffuse a manner" to constitute a point source discharge. *Id.* at 46a.

Even more indirect was the connection between Southview's manure-spreading equipment and the eventual discharge. The equipment applied the manure to the fields. Only later, through natural processes, did some of the manure allegedly collect in the swale and begin its extended journey. The involvement of the equipment was thus even more remote from any eventual discharge than that of the swale. Moreover, if, as all the authorities except the Second Circuit agree, agricultural runoff is nonpoint source, then the court's conclusion must mean that the equipment was a point source of nonpoint source runoff. The CWA's permit requirement applies, however, only to point sources of discharges into navigable waters. Southview's manure spreading vehicles were out of the picture long before any such discharges took place, and they cannot be sources of liability.

D. Sections 208 And 319 Of The Clean Water Act Assign Regulation Of Nonpoint Sources Of Pollution To The States

The Second Circuit's opinion disrupts a settled Congressional design leaving regulation of nonpoint sources of water pollution to the states. "[T]he Clean Water Act establishes distinct roles for the Federal and State Governments." *PUD No. 1 of Jefferson County* v. *Washington Dept. of Ecology*, 114 S. Ct. 1900, 1905 (1994). In contrast to the heavy federal involvement in regulation of point sources through the NPDES permit program, "the federal government leaves the control of non-point source pollution largely to the states." Gould, *supra*, 23 U.C. Davis L. Rev.

at 472. See also Fentress, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited?*, 19 Envtl. L. 807, 808 (1989) (CWA left "regulation of nonpoint sources to the states"); Davidson, *supra*, 34 S.D. L. Rev. at 44 ("Congress * * * has largely deferred to the states" regarding nonpoint source management). Congress deferred to the states primarily by enacting CWA sections 208 and 319.

Congress enacted section 208 to create a "laboratory for new institutional control mechanisms for vexing nonpoint source problems." S. Rep. No. 414, at 10. Section 208 directs state governors to identify water pollution problems, select representatives to develop area-wide management plans, and designate agencies to implement them. 33 U.S.C. § 1288. Although plans must be approved by the EPA, federal involvement is designed to be minimal. Section 319 added a detailed nonpoint source management program to the CWA in the Water Quality Act of 1987. It strengthened the role of the states by requiring them to submit detailed reports to the EPA on their assessments of and management plans for controlling nonpoint source pollution. 33 U.S.C. 1329. See U.S. EPA, Office of Water, *Managing Nonpoint Source Pollution* (1992).

Congress specifically intended that agricultural runoff of the type at issue here would be regulated by the states, not by the federal NPDES program. The 1972 Senate Report, explaining its definition of "point source," stated that "[t]he control of pollutants from runoff is applied pursuant to section [208] and the authority resides in the State or other local agency." S. Rep. No. 414, *reprinted in* 1972 U.S.C.C.A.N. at 3774. Indeed, section 208 specifically requires the state-developed plans to address agriculturally related nonpoint source pollution, *including runoff from manure disposal areas*. 33 U.S.C. § 1288(b)(2)(F).

The EPA has itself recently indicated that runoff from land application of manure does not implicate NPDES: "While the program can move manure into a controlled storage structure, no farmer is specifically required to undertake further BMPs [Best Management Practices] when the manure is taken out of storage. Therefore, the farmer can encourage runoff of these wastes by applying them to cropland at rates that exceed crop uptake." U.S. EPA, Office of Water, *Managing Nonpoint Source Pollution*, *supra*, at 189. See also Noble & Looney, *The Emerging Legal Framework for Animal Agricultural Waste Management in Arkansas*, 47 Ark. L. Rev. 159, 171 (1994) ("Congress and the EPA, at the national level, did not intend for the NPDES program to extend to land application sites that are a part of an agricultural operation"). The court of appeals' decision undermines this widely held and widely relied upon understanding.

Congress' policy reasons for delegating to the states the primary control over nonpoint source pollution, including that from agriculture, are easily discerned. Point sources "are end-of-the-pipe discharges that are easy to regulate" under the NPDES permit program. U.S. EPA, Office of Water, *Nonpoint Source Solutions* 4 (1989). Nonpoint sources, however, "are harder to identify and control [and] depend upon localized features such as land uses, climate, and geology." Letson, *Point/Nonpoint Source Pollution Reduction Trading: An Interpretive Survey*, 32 Nat. Resources J. 219, 220 (1992). Thus, the "site-specific nature" of the problem renders local control more cost-effective. *Ibid.* In addition, the technology-based federal standards may be too inflexible to manage the diversity of nonpoint source problems. Finally, because "agricultural wastes are not concentrated in effluent pipes or exhaust stacks," to regulate them in the same manner as point source discharges would be both "unenforceable" and "nonsensical." Sivas, *supra*, 7 Stan. Envtl. L.J. at 159. Thus,

there was good reason for Congress to allot control over most agriculture-based pollution to the states. This division of responsibilities also was consistent with the CWA's underlying policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 101(b). See *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597 (1991) (regulation of pesticide spraying a matter of state, not federal, law).

The court of appeals acknowledged the CWA's delegation to the states of control over nonpoint source pollution, but it proceeded to ignore the CWA's clear mandate that state control applies to all nonpoint source pollution, including manure runoff. By insisting that Southview is a CAFO, and that the agricultural stormwater runoff exemption had no application here, the Second Circuit managed to throw into question this entire statutory scheme, at least as applied to large dairy and other livestock farms. Whether or not New York was doing an adequate job of controlling manure runoff and other nonpoint source pollution is not at issue here. What is at issue is the court of appeals' overreaching into the legislative domain. This Court should intervene to return the regulation of non-point sources to the states.

II. THE COURT OF APPEALS' DECISION WILL RENDER MANURE FERTILIZATION UNECONOMICAL AND DELIVER A DEVASTATING BLOW TO ALREADY BELEAGUERED FARMERS AND RANCHERS

Few dairy farms today rely on pasturage to feed their mature livestock. Modern farms like Southview recycle their manure. They spray the liquid extract and spread the solids on their crop fields in a program of organic fertilization. Not only is this process economically efficient, but it reduces evnironmental exposure to the deleterious effects of chemical

fertilizers. See Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 Neb. L. Rev. 210, 239 (1993) ("agricultural practices which protect the environment while preserving the profitability of farmers [include] using animal wastes for fertilizer"). Fertilization in this manner may also protect against contamination of groundwater by seepage of consolidated animal wastes. See Sivas, *supra*, 7 Stan. Envtl. L.J. at 126.

By transforming all large dairy farms into CAFOs and thus into potential point sources of water pollution—then compounding the problem by gutting the agricultural stormwater exemption—the court of appeals' decision will likely force all large dairy and livestock farms to assume the considerable costs associated with compliance with federal regulation. Application fees, inspection mandates, potential CWA fines and damages, legal fees, bureaucratic paperwork, time lost to comply—all these costs will either make farming less profitable and thus less desirable as a livelihood and investment, or will drive up the prices charged consumers for basic dairy foods like milk, butter, and cheese. The Second Circuit's ruling will not only increase the costs of farming, but may also discourage farmers from recycling their animal wastes. Moreover, the availability of agricultural credit, already a significant problem, will worsen as lenders worry about their own potential CWA liability. See *Kelley* v. *EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994) (holding that lenders may be held liable under CERCLA).

After all, there is nothing particularly unique about Southview's application of liquid manure to its crop fields as opposed to similar activities performed on a daily basis all over rural America. If Southview's manure fertilization violated the CWA, so do the endeavors of myriad other farmers. The court of appeals' decision is thus likely to render modern farmers' sensible utilization of agricultural wastes economically unviable. At a minimum, it will make farming a less desirable livelihood and further the already

considerable flight from the land. See *West Lynn Creamery, Inc.* v. *Healy*, 114 S. Ct. 2205, 2221 (1994) (Rehnquist, C.J., dissenting) (noting that "beleaguered dairy farmers" are "beset by steady or declining prices and escalating costs"); Pins, *25% Quit Farming in 1980's*, Des Moines Reg., May 22, 1992, at 1A.

Congress has determined that such routine agricultural activities are not to be federally regulated in the same manner as industrial and municipal enterprises. That determination was the result of a host of complex policy considerations—including the difficulty of federal oversight of agriculture-based pollution, the superior capacity of the states to devise balanced programs and to experiment with alternative solutions, and the desirability of protecting farmers and the agricultural sector of our society from costly regulation. As the EPA has expressed it, the "diffuse" character of nonpoint source discharges (like the runoff at issue here) engenders "different problems" and requires "different political science," "different social science," and "different science." U.S. EPA, Office of Water, *Nonpoint Source Solutions* 4 (1989). This Court should grant certiorari to ensure that this comprehensive federal policy is not overthrown by a poorly considered decision that will have nationwide impact.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT; Philip Karcheski; Kathleen Karcheski, Individually and as Parents and Legal Guardians of Brian Karcheski and Robyn Karcheski, Infants; Lois E. Link; Daniel L. Wilson; William A. Fagan; Betty C. Fagan; Jeffrey Ferris; Linda Ferris, Individually and as Parents and Legal Guardians of Chad J. Ferris, Stacey P. Ferris and Shawn W. Ferris; Kirk Schroeder, Individually and as Parent and Legal Guardian of Stacy L. Schroeder; Kirk Bly and Vickie Bly, Plaintiffs-Appellants,

v.

SOUTHVIEW FARM and Richard H. Popp, Defendants-Appellees.

No. 1608, Docket 93-9229.

United States Court of Appeals,
Second Circuit

Argued May 16, 1994.

Decided Sept. 2, 1994.

Before: OAKES and MINER, Circuit Judges, and CARTER, Senior District Judge.*

OAKES, *Senior Circuit Judge*:

This is a citizen's suit under the Clean Water Act of 1977, 33 U.S.C. §§ 1251 et seq. (1988 & Supp. IV 1992),

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* The Honorable Robert L. Carter, Senior District Judge, Southern District of New York, sitting by designation.

("CWA" or the "Act"), with some state law claims for nuisance, negligence and trespass. The suit arises on account of the liquid manure spreading operations of a large dairy farm in western New York. After denial of a motion to dismiss the complaint and of a motion for summary judgment, the case proceeded to jury trial. See *Concerned Area Residents for the Env't* v. *Southview Farm*, 834 F.Supp. 1410 (W.D.N.Y. 1993) ("CARE I"). Following a jury verdict in plaintiffs' favor on five CWA violations and the state law trespass claim, the United States District Court for the Western District of New York, David Larimer, Judge, granted judgment to the defendants as a matter of law on the five CWA violations. *Concerned Area Residents for the Env't* v. *Southview Farm*, 834 F.Supp. 1422 (W.D.N.Y. 1993) ("CARE II"). The court left standing the verdict and damages of $4,101 on the trespass count. CARE II, 834 F.Supp. at 1435-37.

The appeal by plaintiffs involves only the five CWA violations and raises anew the question what is a "point source" within the meaning of 33 U.S.C. § 1362(14), a question this court touched upon in *United States* v. *Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (holding that, for purposes of criminal liability, a human being is not a point source under the CWA), cert. denied, ___ U.S. ____, 114 S.Ct. 2764 (1994). The appeal also concerns whether the liquid manure spreading operations fell within the "agricultural stormwater discharges" exception to point source discharges under the Act. 33 U.S.C. § 1362(14).

We now hold that the liquid manure spreading operations are a point source within the meaning of CWA section 1362(14) because the farm itself falls within the definition of a concentrated animal feeding operation ("CAFO") and is not subject to the agricultural exemption.

I. Background

Plaintiffs, who refer to themselves collectively as Concerned Area Residents For the Environment ("CARE"), are a group of land owners who live near Southview Farms, a dairy farm in the town of Castile, in Wyoming County, New York. Defendants are the farm itself, and Richard H. Popp, an individual. Southview Farm is one of the largest dairy farms in the State of New York. It employs twenty-eight full-time and nine part-time employees. As of 1992, it owned 1,100 crop acres and had an animal population of 1,290 head of mature cows with over 900 head of young cattle, heifers and calves, making a total of 2,200 animals.

Unlike old-fashioned dairy farms, Southview's operations do not involve pasturing the cows. Instead, the cows remain in their barns except during the three times per day milking procedure. Also unlike old-fashioned dairy farms where the accumulated manure was spread by a manure spreader, Southview's rather enormous manure operations are largely performed through the use of storage lagoons and liquid cow manure. The storage lagoons number five on the main farm property ("A Farm"). One four-acre manure storage lagoon has a capacity of approximately six-to-eight million gallons of liquid cow manure.

In connection with this particular manure storage lagoon, Southview has installed a separator which pumps the cow manure over a mechanical device which drains off the liquid and passes the solids out through a compressing process. The solids that remain are dropped into bins for transport while the liquid runs by gravity through a pipe to the four-acre manure storage lagoon. This separated liquid was apparently used for the purpose of washing down the barns where the cows are housed.

Insofar as application of the manure as fertilizer to the land is concerned, there is a center pivot irrigation system for spreading liquid manure over the fields. The diameter of the

circle of this irrigation system can be modified to conform to the field on which the application is being made. A series of pipes connects the pivot to the liquid manure storage lagoons. The pivot is self-propelled with the height of the arc from the manure spray being somewhere between 12 and 30 feet.

Southview also spreads its manure with a hard hose traveler which is a long piece of plastic tubing on a large reel. The traveler can be unwound and has a nozzle on the end which can send liquid manure 150 feet in either direction making a 300-foot-wide swath for purposes of fertilizing farm fields. The height of the arc from the projected spray is "a couple of feet higher" than that of a center pivot irrigator. Since 1988, a piping system consisting of a six-inch aluminum pipe and running under both the state highway and a town road to a lagoon on at least one Southview Farm other than the "A Farm," has transported liquid manure from the storage lagoon to various locations without the use of vehicles.

Southview also uses conventional manure spreading equipment including spreaders pulled by tractors and self-propelled vehicles which, generally speaking, have a 5,000 gallon capacity for liquid manure. These vehicles were used to spread manure from the smaller lagoons on the "A Farm" which do not receive liquid manure processed through the separation system. Southview's manure spreading record reflects the application of millions of gallons of manure to its fields.

II. Procedural Posture

On May 9, 1990, the plaintiffs notified Southview Farms and Richard H. Popp that they intended to sue the defendants for violations of federal and state environmental laws in connection with Southview's manure operations. (Letter of 5/9/90 from Alan J. Knauf, attorney for CARE, to Richard H. Popp.) On January 22, 1991, the plaintiffs filed the original complaint. Complaint, *CARE* v. *Southview Farms*,

No. 91-6031 (W.D.N.Y. filed January 22, 1991) ("Original Complaint") and on May 31, 1991, they filed an amended complaint. Complaint, *CARE* v. *Southview Farms*, No. 91-6031 (W.D.N.Y. filed May 31, 1991) ("Amended Complaint").

On May 19, 1993, after a three-week trial commencing April 26, 1993, the eight-person jury returned a verdict in favor of the plaintiffs on five of the eleven CWA violations which had been submitted to the jury for its consideration. On July 1, 1993, the defendants filed a motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b). On October 19, 1993, the court granted in part the defendants' Fed.R.Civ.P. 50(b) motion for judgment as a matter of law ("judgment m.o.l.," formerly judgment notwithstanding the verdict or "judgment n.o.v."), CARE II, 834 F.Supp. at 1437, and a final judgment was entered thereafter.

On November 18, 1993, the plaintiffs timely filed a notice of appeal. This court has jurisdiction under 28 U.S.C. § 1291 (1988).

III. Standard of Review

The moving party bears a heavy burden to prevail on its motion for judgment m.o.l. Fed.R.Civ.P. 50(b); *Stubbs* v. *Dudley*, 849 F.2d 83, 85 (2d Cir. 1988), cert. denied, 489 U.S. 1034 (1989). In ruling on such a motion, the court must "consider the evidence in the light most favorable to the [non moving party] and . . . give that party the benefit of all reasonable inferences that the jury might have drawn in [its] favor from the evidence." *Smith* v. *Lightning Bolt Productions, Inc.*, 861 F.2d 363, 367 (2d Cir. 1988). To grant a judgment m.o.l., the court must find that there is "'such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or . . . such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against

[it].'" *Song* v. *Ives Lab., Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992) (quoting *Mattivi* v. *South African Marine Corp., "Huguenot"*, 618 F.2d 163, 168 (2d Cir. 1980)).

IV. Discussion

The CWA provides that, absent a permit and subject to certain limitations, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a); see Plaza Health, 3 F.3d at 645. A pollutant includes "solid waste, . . . sewage, . . . biological materials, . . . and agricultural waste discharged into water" and thus includes the manure in this case. 33 U.S.C. § 1362(6). A "discharge" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "point source" includes "any discernible, confined and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation. . . . This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). Our basic questions on review then are whether the defendants discharged the manure pollutant from any point source into navigable waters and whether the agricultural stormwater exemption or any other limitation applies.

The plaintiff-appellants' contentions relate to five specific CWA violations which the jury found but the district court overturned on the defendants' motion for judgment m.o.l. These specific violations are as follows:

(1) A July 13, 1989, violation on field 104 on the so-called Wyant Farm, located to the east of Middle Reservation Road and bordering on Letchworth State Park through which the Genesee River runs. As to this violation, two of the plaintiffs observed liquid manure flowing into and through a swale on the Wyant Farm and through a drain tile leading directly into a stream which ultimately flows into the Genesee River.

(2) July 12, 1989, and August 22, 1989, violations as to which the district court concluded that the jury finding of a discharge was "sheer surmise and conjecture." While the district court concluded that there was a "complete absence of substantial evidence supporting the verdict," the appellants argue that there is strong circumstantial evidence adequately supporting the jury's conclusion with respect to these violations.

(3) September 26, 1990, and April 15, 1991, violations as to which the appellants claim that the district court erroneously set aside the jury verdicts because no reasonable juror could find that the discharges were not excepted under the Act as agricultural stormwater discharges.

It is at this point that the United States amicus position and the position of the appellants tend to coincide, if not directly meet. It is significant to note, as previously stated, that the cows are not put out to pasture. The fields to which the manure is applied, as above indicated, are used for crops. The United States appears as amicus curiae in support of the appellants on the basis that, because the Southview operations involve more than 700 cattle, it is a facility which is defined in the regulations under the Act as a CAFO, and therefore one type of "point source" under the Act, thereby requiring a permit for discharges which was not obtained in this instance. As we have stated, the Act defines the term "point source" as including "any . . . concentrated animal feeding operation." 33 U.S.C. § 1362(14). In this connection, the district court concluded that, as a matter of law, Southview was not a CAFO because crops are grown on a portion of the farm. The United States contends that Southview is a CAFO as a matter of law because crops are not grown in the feed lot in which the milking cows are confined.

In the following discussions we explore the appellants' contentions in turn and then discuss the United States' position as amicus with respect to the September 26, 1990,

and April 15, 1991, CWA violations which is opposed by the New York State Farm Bureau as amicus.

A. July 13, 1989, Violation on Field 104

The July 13 violation, found by the jury but overturned by the district court, as we have said, occurred on field 104 on the Wyant property which shares the boundary line with Letchworth State Park. Field 104 contains a slew or swale which tends to collect liquid manure spread by Southview's tankers and conveys it through a pipe in a stonewall and through the stonewall itself into a ditch which runs for some length on the Southview property before it reaches the boundary of the state park.

On July 13, 1989, appellants Kirk Bly and Philip Karcheski observed the manure collecting in the slew or swale and flowing into the ditch which in turn flowed off of the Southview property into Letchworth State Park property, and, in turn, joined a stream which ultimately flowed into the Genesee River. (Transcript of 4/30/93 at 9 ("Bly Testimony")); (Transcript of 4/28/93 at 6 ("Karcheski Testimony")).

The district court held and appellees contend that the July 13 discharge was not a point source discharge because the liquid simply and quite naturally flowed to and through the lowest areas of the field, and that the pollutants reached the stream that flows into the Genesee "in too diffuse a manner to create a point source discharge." The district court also suggested that the pollutants were not "collected" by human activity but in fact the opposite occurred in that the manure was dispersed over the ground.

The appellants argue that, given the testimony and the photographic evidence (reprinted in Joint Appendix at 216, 218-223) before the court, even if the liquid manure flowing from field 104 into the swale could be characterized as "diffuse run-off," as the district court characterized it, the manure pollutant was nevertheless thereafter channelled or

collected sufficiently to constitute a discharge by a point source. Alternatively, the appellants contend that the appellees' liquid-manure-spreading vehicles themselves may be treated as point sources because 33 U.S.C. § 1362(14) defines a point source to include a "container" or "rolling stock." They point out that a number of district court cases have found vehicles to be within the definition of point sources. See, e.g., *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes constitute point sources under the CWA); *United States* v. *Tull*, 615 F.Supp. 610, 622 (E.D.Va. 1983) (bulldozers and dump trucks), aff'd, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Weisman*, 489 F.Supp. 1331, 1337 (M.D.Fla. 1980) (bulldozers and dump trucks). They urge that by pumping the liquid manure from Southview's various lagoons into manure spreading tankers and other vehicles before discharging the liquid manure on to its various fields, Southview has "collected by human effort" the pollutant discharged into the navigable waters. See *Plaza Health*, 3 F.3d at 651 (Oakes, J., dissenting).

We agree with the appellants on both counts. We believe that the swale coupled with the pipe under the stonewall leading into the ditch that leads into the stream was in and of itself a point source. As this court has previously noted, the definition of a point source is to be broadly interpreted. *Dague* v. *City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991), rev'd on other grounds, ___ U.S. ____, 112 S.Ct. 2638 (1992); see also *Sierra Club* v. *Abston Constr. Co.*, 620 F.2d 41, 45-46 (5th Cir. 1980) (defendants were engaged in strip mining operations and placed their overburden in highly erodible piles which were then carried away by rain water through naturally created ditches); *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (discharge from a large capacity reserve sump serving a gold extraction process could be a point source even though "the

source of the excess liquid is rainfall or snow melt"). In Sierra Club, the Fifth Circuit held that a defendant is not relieved from liability simply because it does not actually construct the conveyances "so long as they are reasonably likely to be the means by which the pollutants are ultimately deposited into a navigable body of water." *Sierra Club*, 620 F.2d at 45; see also *United States* v. *Oxford Royal Mushroom Prods., Inc.*, 487 F.Supp. 852, 854 (E.D.Pa. 1980) (discharge resulting from spraying overabundance of water onto surface of an irrigation field which, in turn, ran off into a nearby stream through a break in a berm around the field may constitute discharge from a point source). Here, the liquid manure was collected and channelized through the ditch or depression in the swale of field 104 and thence into the ditch leading to the stream on the boundary of the Southview property as it adjoins Letchworth State Park. Nothing in *Plaza Health* is to the contrary. There the court simply refused to treat a human being as a "point source" under the criminal provisions of the Act by virtue of the rule of lenity. *Plaza Health*, 3 F.3d at 649.

Moreover, we agree with the appellants that, alternatively, the manure spreading vehicles themselves were point sources. The collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law. See, e.g., *Tull*, 615 F.Supp. at 622; *Weisman*, 489 F.Supp. at 1337; *Avoyelles Sportsmen's League, Inc.* v. *Alexander*, 473 F.Supp. 525, 532 (W.D.La. 1979); see also Karcheski Testimony at 8 (testifying that, on July 12 and 13, tankers were used to spread manure onto field 104); Bly Testimony at 7-8 (same).

The district court also believed that the defendant's actions were "the kind of activity that Congress wanted to keep beyond the reach of the Act," like irrigation return flows or storm-water runoffs. Again, we disagree, for reasons that

appear below in our discussion of the position of the United States.

B. July 12, 1989, and August 22, 1989, Violations

Bly and Karcheski observed liquid manure spreading and tracked it down field and downstream on July 13, the day after they observed the spreading in the same field of "a large amount of liquid manure." In particular, Bly stated that, "on July 12, 1989," "[t]here was a racetrack type pattern in the field, and what caught my eye was a running light in the far corner of the field." Bly Testimony at 6. Bly observed Southview vehicles for several minutes and made an entry on his calendar indicating "dumping in [the] corner of [the] field, above stream, across from Wells' farm." Bly Testimony at 6-7. Karcheski on that same evening at dusk while driving on Middle Reservation Road, "noticed a light" "in the southeastern corner of [field 104]," Karcheski Testimony at 3, and returning about an hour or so later observed tanker trucks entering the Wyant Farm property via a field adjacent to field 104. Each testified that the same spreading activities were occurring on both July 12 and July 13. See Bly Testimony at 7-8; Karcheski Testimony at 7.

Similarly on August 22, 1989, both Bly and Karcheski observed Southview's vehicles spreading manure on the same field. Bly testified that "again, this is the same field, same area, and again, I noticed a heavy application of manure had been applied again." Bly Testimony at 11. Karcheski testified that "the tankers were coming down the road again and entering the same area, and I waited until they went by, and I turned around and came back." Karcheski Testimony at 8.

The district court held that the jury's finding of a discharge on July 12, 1989, and August 22, 1989, was "sheer surmise and conjecture" because the plaintiffs' offered no direct eyewitness testimony of manure actually leaving Southview

property on those dates. This finding overlooks the strong circumstantial case made out by the plaintiffs and also disregards the standard applicable to a Rule 50(b) motion for judgment m.o.l. As we stated earlier, but now stress:

> In ruling on a motion for a judgment n.o.v., the district court is required to consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence. The court "'cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury.'"

Lightning Bolt Prods., 861 F.2d at 367 (quoting *Katara* v. *D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970 (2d Cir. 1987) (quoting *Mattivi*, 618 F.2d at 167); see also Fed.R.Civ.P. 50(a); *Toltec Fabrics, Inc.* v. *August Inc.*, ___ F.3d ___, 1994 WL 365538, at *5 (2d Cir. July 8, 1994).

We believe that the jury was justified in inferring that the same activities that Bly and Karcheski observed in detail on July 13, 1991, probably had the same result on July 12, 1989, and August 22, 1989, namely that they were violations of the Clean Water Act at field 104. Proof of three subsequent discharges of liquid manure from the same field on April 14, 1991, April 15, 1991, and October 4, 1991, coupled with plaintiffs' trial exhibits depicting discharges which were observed and photographed on those days further buttressed the testimony of Bly and Karcheski. See Photographs (reprinted in Joint Appendix at 216, 218-23). Although those particular subsequent discharges were not included as specific point source discharges within either the amended or supplemental complaints, they provided the jury with additional evidence with which to infer that violations of the Clean Water Act did occur on both July 12, and August 22, 1989. As stated in *O'Brien* v. *Nat'l Gypsum Co.*, 944 F.2d 69, 72 (2d Cir. 1991), "it is beyond any doubt that circumstantial evidence alone may suffice to prove

adjudicative facts." See also *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960); *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1184 (2d Cir.), cert. denied, ___ U.S. ____, 113 S.Ct. 82 (1992). The fact that the evidence of the point source discharges "is circumstantial does not render the jury's conclusion conjectural." *In Re Joint Eastern and Southern Dists. Asbestos Litig.*, 798 F.Supp. 925, 931 (E. & S.D.N.Y. 1992), rev'd on other grounds, 995 F.2d 343 (2d Cir. 1993) and 995 F.2d 346 (2d Cir. 1993).

C. September 26, 1990, and April 15, 1991, Violations

We believe the district court also erred in setting aside the jury's verdict on the September 26, 1990, and April 15, 1991, violations on the basis that "no reasonable juror could find that these discharges were not excepted under the Act as agricultural stormwater discharges." CARE II, 834 F.Supp. at 1430. The district court drew this conclusion even though it had given explicit instructions to the jury on the availability of the "agricultural stormwater" exemption under 33 U.S.C. § 1362(14). Id. at 1429.

We agree with appellants that, while the statute does include an exception for "agricultural stormwater discharges," there can be no escape from liability for agricultural pollution simply because it occurs on rainy days. For guidance in our analysis, we examine the legislative and regulatory history of this exception which the court relies upon in arriving at its conclusion.

The exemption at issue was added by the Water Quality Act of 1987, Pub.L. No. 100-4 § 503, 101 Stat. 7, 75 (1987). Because Congress mandated comprehensive regulations of certain forms of industrial and municipal stormwater run-off under 33 U.S.C. § 1342(p), one can infer that Congress wanted to make it clear that agriculture was not included in this new program. We agree that agricultural stormwater run-off has always been considered nonpoint-

source pollution exempt from the Act. See, e.g., 40 C.F.R. § 122.3(e) (1993) (excepting "introduction of pollutants from non point-source agricultural and silvicultural activities").

We think the real issue is not whether the discharges occurred during rainfall or were mixed with rain water run-off, but rather, whether the discharges were the result of precipitation. Of course, all discharges eventually mix with precipitation run-off in ditches or streams or navigable waters so the fact that the discharge might have been mixed with run-off cannot be determinative. Accordingly, we must uphold the verdict to the extent that the jury had a reasonable basis to find that the discharges on September 26, 1990, and April 15, 1991, were not the result of rain, but rather simply occurred on days when it rained. We first examine whether the jury had a reasonable basis to find that these two violations were not the result of rain. We then examine whether the alleged violations must be categorized as "agricultural stormwater discharges," or whether they fall into the CAFO exception.

1. The Jury's Findings

As to the September 26 discharge, Karcheski testified that, "after a rain[ ] and manure had been applied on the field, [the manure] was literally running off everywhere up and down those field-type areas." Karcheski Testimony at 14-15. Similarly, Bly testified that he "could see the manure flowing, the tracks made by the equipment, flowing off the end of the field where there was severe erosion." Bly Testimony at 16. The New York State Department of Environmental Conservation Report ("D.E.C. Report"), reprinted in Joint Appendix at 227, while indicating that the run-off was attributed to "heavy rain," also points out that the "[f]ields have been saturated with liquid manure and farm continues to spread in same area." Sally Hunt, a witness who is not a party but who lives near the Karcheskis, testified that Southview Farms had spread the manure which "had pooled in the corner of their field right next to our

property . . . larger than I had seen before, and it had been pooled there, and then it rained. . . . Then it drizzled into the ditch and through the drainage pipe." (Transcript of 5/5/93 at 4). We think the jury could properly find that the run-off was primarily caused by the over-saturation of the fields rather than the rain and that sufficient quantities of manure were present so that the run-off could not be classified as "stormwater."

As to the April 15, 1991, discharge, Karcheski testified that there was "a lot of manure [was] coming off the field through the areas where the banks had fallen away and . . . tractors had come in and out, and they leave culverts or furrows and that. There was primarily in the bottom it had a lot of manure coming off." Karcheski Testimony at 20. Bly testified that, on April 14, 1989, he "observed heavy manure applications, once again, to this field" and "brown" "water runoff flowing off the field towards the fencepost." Bly Testimony at 28, 39. Photographs were received in evidence, and, based upon these photographs and Bly's testimony, the jury could have found a discharge unaffected by rain "on or about April 15, 1991." Similarly, as to the April 15 incident, the D.E.C. Report, reprinted in Joint Appendix at 226, while attributing the incident to rain, noted that there was "[e]xtra heavy application of manure in fields" and a "heavy cover of liquid manure."

2. CAFO Exception To Nonpoint Source Provisions

The New York Farm Bureau, Inc., and American Farm Bureau Federation, as amici curiae, ("Farm Bureau amici"), argue that agricultural activities are regulated as "nonpoint sources" under the Clean Water Act and are not subject to citizens' suits enforcement. They point out that the Act had its origin in the Federal Water Pollution Control Act Amendment of 1972, 33 U.S.C. § 1251 et seq., and that this act focused on "point source" discharges. The 1972 amendment imposed effluent limitations through a federally mandated and supervised permit system, the National

Pollution Discharge Eliminations System (N.P.D.E.S.), Pub.L. No. 92-500, § 403, 86 Stat. 816, 883 (1972), modified as amended, 33 U.S.C. § 1342 (1988 & Supp.IV 1992). The Farm Bureau amici point out that nonpoint sources "were addressed by Congress through the Section 208 planning process which placed primary responsibility on the states." Brief of Farm Bureau Amici at 6 (citing Pub.L. No. 92-500, § 208 (1972), 86 Stat. 816, 839, codified as amended, 33 U.S.C. § 1288 (1988 & Supp. IV 1992); S.Rep. No. 414, 92d Cong., 1st Sess. 139, reprinted in 1972 U.S.C.C.A.N. 3668 ("S.Rep. 414")). Thus, when Congress enacted the 1972 Amendments, it considered and chose to exempt agricultural activities under the Section 208 nonpoint source provisions "except in the case of [CAFOs]." Brief of Farm Bureau Amici at 7 ((emphasis added) (citing Pub.L. No. 92-500, § 208(b)(2)(F), 86 Stat. 816, 841 (1972), codified as amended, 33 U.S.C. § 1288(b)(2)(F); S.Rep. 414, reprinted in 1972 U.S.C.C.A.N. at 3759) (supplemental views of Sen. Dole)).

It is understood that the 1972 framework remains in place and that the revision made in 1977 to the point source definition excluded "return flows from irrigated agriculture," 33 U.S.C. § 1362(14), thereby overriding, in part, *Natural Resources Defense Counsel, Inc.* v. *Train*, 396 F.Supp. 1393, 1402 (D.D.C. 1975) (holding that the Federal Water Pollution Control Act Amendments of 1972 do not authorize the exclusion of point sources in the agriculture, storm sewer, and silviculture categories from the permit requirements of the N.P.D.E.S.), aff'd sub nom. *Natural Resources Defense Council, Inc.* v. *Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977) (holding that the E.P.A. has no discretion to limit regulation of point sources to those it deems most significant). The Congress is said to have made its intent clear in the legislative history which states that the "effect" of the newly created section 402 is to amend section 208(b)(2)(F) and to "exempt irrigation return flows from all

permit requirements under section 402 . . . and assure that area wide waste treatment management plans under section 208 include consideration of irrigated agriculture." S.Rep. No. 95-217, 95th Cong., 1st Sess. 35 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4360. The Report further provides:

> In exempting discharges composed "entirely" of return flows from irrigated agriculture from the requirements of section 402, the committee did not intend to differentiate among return flows based upon their content. *The word "entirely" was intended to limit the exception to only those flows which do not contain additional discharges from activities unrelated to crop production.*

Id. (emphasis added).

Not disagreeing with any of the above, the United States amicus points out that the Clean Water Act by definition includes in the term "point source," "any discernible, confined and discrete conveyance, including but not limited to, any . . . concentrated animal feeding operation. . . ." 33 U.S.C. § 1362(14). The regulatory definition of a CAFO is found at 40 C.F.R. 122.23(b) (1994). This provision defines CAFO as an animal feeding operation ("AFO") that meets the criteria of appendix B, which, as pertinent here denotes that the AFO contains more than 700 mature dairy cattle. 40 C.F.R. 122.23(b). The preambles to the regulations indicate that if an AFO exceeds the relevant number of animal units provided in Appendix B Supp. to Part 122 at (a), the AFO is presumably a CAFO, unless "the only time a discharge of pollutants into navigable waters occurs is during a 25 year, 24-hour rainfall event." 40 Fed.Reg. 54182, 54183 (Nov. 20, 1975) (proposed regulations); 41 Fed.Reg. 11458, 11458 (Mar. 18, 1976) (final regulations); see also Brief for United States Amicus at 7. Given that it is undisputed that the feed lot at Southview confines more than 700 mature dairy cattle, Brief for Defendants-Appellees at 4, and there is no claim that the run-offs in question were caused by a 25-year, 24-

hour rainfall event, we face the question whether the fact that crops are grown on the fields, even though the cattle at Southview are not pastured on those fields, prevents Southview from being an AFO.

An AFO is defined in the regulations as "a lot or facility . . . where the following conditions are met:

> (i) Animals . . . have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and, (ii) crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

40 C.F.R. 122.23(b)(1). There appears to be no doubt that Southview's feed lot meets the criteria of sub-paragraph (i). The district court held that Southview was not an AFO because crops are grown on fields adjacent to the feed lot in which the milking cows are penned; therefore, according to the court, Southview does not meet the criteria of sub-paragraph (ii).

The district court's holding misreads the regulations and particularly paragraph (ii). A lot or facility is an AFO when it confines and maintains animals on a lot which does not contain vegetation in the normal growing season. The vegetation criterion applies to the lot or facility in which the animals are confined. The definition of "feed lot" contained in the regulations setting forth technology-based effluent limitations for such facility supports this interpretation. While the effluent limitation applicable to feed lots is not applicable to Southview because it has not obtained an N.P.D.E.S. permit, 40 C.F.R. 412.12, nevertheless, the regulation lends support to the United States' position, and the view we adopt, that the vegetation criterion pertains only to the lot or facility in which the animals are confined under that definition or "feed lot." It is said to be

> a concentrated, confined animal or poultry growing operation for meat, milk or egg production, or stabling, in pens or houses wherein the animals or poultry are fed at the place of confinement and crop or forage growth or production is not sustained in the area of confinement.

40 C.F.R. 412.11(b). The preamble to this regulation explains that the Environmental Protection Agency ("E.P.A.") chose to exclude from the definition those livestock holding areas in which crops are sustained in the area where the livestock are confined because "[u]nder [such] circumstances the combined effect of soil and vegetative assimilation of manure and the lower rate of manure depletion per unit area could reasonably be expected to preclude any significant pollution problem." 39 Fed.Reg. 5703, 5704 (Feb. 14, 1974). There is thus, as the United States amicus brief explains, a two-fold rationality for the exemption from the definition of CAFO for facilities in which animals are confined in vegetated areas. First, the fact that vegetation can be sustained in the area in which the animals are confined suggests a lower density of animals in that area or otherwise they would eat or trample all of the vegetation. Second, the vegetation itself is helpful in absorbing and reducing the amount of pollution. The E.P.A. regulations probably rely upon confinement in un-vegetated areas as an indicator of the "industrialized" nature of the confinement and therefore they include only such facilities—such as Southview's—within the regulatory definition of "animal feeding operations."

We wish to emphasize that the only previous case squarely on point is in conformity with the position we take here. *Higbee* v. *Starr*, 598 F.Supp. 323, 325 (E.D. Ark. 1984) (hogs confined in finishing houses in which hog waste fell through slats in floors into holding basins and was then spread on neighboring fields; operation held to be a CAFO), aff'd without opinion, 782 F.2d 1048 (8th Cir. 1985). Accordingly, the district court erred in deciding that

Southview does not operate a CAFO based on the growth of crops outside the area in which the cows are confined. Because there are no disputed material facts with respect to whether Southview's feed lot is a CAFO, this court may determine, as a matter of law, that Southview operates a CAFO, which in turn may be defined as a point source and hence is not to be treated as an agricultural nonpoint source operation calling for regulations by the states under the section 208 planning process.

V. Conclusion

In short, we conclude with the United States as amicus, that Southview has an animal feeding lot operation with a tremendous number of cattle in a concentrated feeding facility in which no vegetation is grown; that operation in and of itself is a point source within the Clean Water Act and not subject to any agricultural exemption thereto.

Accordingly the judgment of the district court, setting aside the jury's verdict, is reversed and the cause remanded for further proceedings in accordance with this opinion.

PETITION FOR REHEARING
UNITED STATES COURT OF APPEALS
Second Circuit

GEORGE LANGE III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of November one thousand nine hundred and ninety-four.

Concerned Area, et al

Plaintiffs-Appellants,

v Dkt No: 93-9229

Southview Farm, et al

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellees Southview Farm and Richard H. Popp.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal

and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, et al., Plaintiffs,

v.

SOUTHVIEW FARM and Richard Popp, Defendants.

No. 91-CV-6031L.

United States District Court,
W.D. New York.

October 19, 1993.

DECISION AND ORDER

LARIMER, District Judge.

BACKGROUND.

This is a citizen suit under the Federal Water Pollution Control Act, also known as the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1251 et seq. Also originally pleaded were several supplemental state claims including negligence, nuisance and trespass. The relevant facts have been set out in this Court's prior decisions on defendants' motions to dismiss and for summary judgment, entered on August 29, 1991 and April 7, 1993 respectively. Familiarity with those decisions is assumed.

On May 19, 1993, a jury returned in a verdict in the trial of this action finding that defendants had violated the CWA on five occasions, and that defendants had committed a common law trespass against each plaintiff. The jury found in favor of defendants on six other alleged CWA violations, and it also found no cause of action on all of the negligence and nuisance claims.

The jury awarded damages on the trespass claims, but the court's determination of a remedy for the CWA claims is contingent upon my resolution of these post-trial motions.

Defendants now move for judgment as a matter of law under Fed.R.Civ.P. 50(b) on the CWA and trespass claims.

Defendants' motion is granted on all of the CWA claims, but otherwise denied.

1. *Legal Standard*

Defendants' burden to prevail on a motion for judgment as a matter of law following a jury verdict in plaintiffs' favor is a strict one. *Stubbs v. Dudley*, 849 F.2d 83, 85 (2d Cir. 1988), *cert. denied*, 489 U.S. 1034, 109 S.Ct. 1095, 103 L.Ed.2d 230 (1989). The court should grant the motion "only when (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him." *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 167-68 (2d Cir. 1980). If the evidence, viewed in the light most favorable to plaintiffs, was sufficient to have allowed a reasonable juror to arrive at a verdict for plaintiffs, the motion must be denied. *Konik v. Champlain Valley Physicians Hosp.*, 733 F.2d 1007, 1013 (2d Cir. 1984), *cert. denied*, 469 U.S. 884, 105 S.Ct. 253, 83 L.Ed.2d 190 (1984).

In deciding the motion, the court must draw all reasonable inferences, and resolve all questions of credibility, in plaintiffs' favor. *Id.* "[T]he trial court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury." *Mattivi*, 618 F.2d at 167.

Despite the heavy burden placed on the moving party, however, when it is clear that the evidence does not support

the verdict, the motion must be granted. "It is error to deny a judgment notwithstanding the verdict when it is clear that the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party." *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 815, 121 L.Ed.2d 687 (1992); see also *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 207 (2d Cir. 1984) (district court erred in denying motion for judgment n.o.v. in view of insufficiency of the evidence to support plaintiff's claim).

In addition, a mere scintilla of evidence will not suffice to support a verdict. *Meyers v. Ideal Basic Indus., Inc.*, 940 F.2d 1379, 1383 (10th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 935, 117 L.Ed.2d 106 (1992). "The jury's role as the finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial." *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976). If, after viewing all the evidence most favorably to plaintiffs, the court cannot say that the jury could reasonably have returned the verdict in their favor, it is the court's duty to set the verdict aside. *Id.*

2. *July 12, 1989 and August 22, 1989 CWA Violations*

The jury found that CWA violations occurred on five dates: July 12, 1989; July 13, 1989; August 22, 1989; September 26, 1990; and April 15, 1991. Defendants allege that there is no evidence that the July 12, 1989 and August 22, 1989 discharges occurred at all.

Plaintiff Philip Karcheski testified at trial about the alleged July 12 violation. He stated that while driving his vehicle on a nearby road at dusk, he saw "tanks pulled by the tractors" going into a certain field. Def.Ex. A at 4.[1] "At that point

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[1] References to defendants' exhibits are to the exhibits attached

[he] didn't pay attention" to whether manure was being discharged from the field. *Id.*

His curiosity aroused, Karcheski returned the next evening, July 13, in the company of plaintiff Kirk Bly. Karcheski stated that he saw "the same thing, and still manure trucks were operating the lagoons—the tanker trucks." *Id.* at 5. He then "went into the field, and the area was just kind of saturated with kind of like liquid manure." *Id.* Some of the manure was exiting the property through a ditch. *Id.* at 6.

Bly also testified at trial. He stated that on July 12, while riding on a road, he "noticed a field on the Wyant farm that had received a large amount of—a large amount of liquid manure." Def.Ex. B at 6. He stopped his vehicle and looked at the field and a "running light in the far corner of the field" for several minutes, but he did not get out of his vehicle to inspect the field. *Id.*

Bly also testified that when he went back to that spot on July 13, first alone and then with Karcheski, what he saw was "very similar to what [he] observed on the 12th." *Id.* at 8. Walking around with Karcheski, he saw "a slurry type manure" flowing out of the field and eventually into a stream. *Id.* at 9.

As to the August 22 violation, Karcheski testified that on that date he saw "the tankers . . . coming down the road again and entering the same area [as on July 12 and 13] . . ." Def.Ex. A at 8. He stayed for about ten or fifteen minutes, and did not see any liquid manure leaving defendant's property. *Id.*

Bly gave similar testimony. He said that in "the same field, same area" as on July 12 and 13, he "noticed a heavy application of manure had been applied again." Def.Ex. B

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to the July 1, 1993 affidavit of John W. Clarke, Esq., in support of the motion *sub judice* (Court document # 63).

at 11-12. He did not actually enter the field, and he did not testify that he saw any discharges from the property.

In my view, this testimony is not sufficient to support the jury's finding that discharges occurred on July 12 and August 22. Neither Karcheski nor Bly stated that they actually saw a discharge of manure from the property on either date, and their testimony was not strong enough to support an inference that violations occurred on those days simply because they saw a discharge in the same area on July 13. There are so many variables involved—the amount of manure spread, the duration of the spreading, the physical condition of the ground, etc.—that it would be speculation to infer discharges on July 12 or August 22 based on the July 13 incident.

Even assuming that defendants were spreading manure in the exact same manner and place on the 12th as on the 13th, that alone does not warrant drawing the conclusion that a discharge of pollutants into navigable waters occurred on the 12th merely because one allegedly occurred on the 13th. For one thing, there was no evidence of how long defendants had been spreading manure when Karcheski and Bly saw the tank trucks on July 12. Both men said that they noticed manure-spreading going on in the early evening of July 12. Neither knew how long this activity had been going on at that point, which would obviously have a bearing on the amount of manure the field had received.[2]

Moreover, the conditions under which the manure was spread on July 13 differed in one highly important respect from the day before, precisely because defendants *had* spread manure on the 12th. If defendants spread manure in the same area on both days, then there must have already been

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[2] Karcheski stated only that he saw defendants' trucks twice that evening, and that the second time was "maybe an hour or so" after the first. Def.Ex. A at 4.

manure on the ground when they began spreading on the 13th. That would obviously make it more likely that the ground would become saturated sooner and the manure would spill out from the field.

Evidence from which the jury could have reasonably inferred a discharge on August 22 is also lacking. Even crediting Bly's statement that the application of manure that day was "heavy," that simply does not warrant the conclusion that some of the manure left the field and entered navigable waters. Bly's statement that the weather that day was "dry," Def. Ex. B at 12, further weakens such an inference.

What remains as to both dates, then, is testimony that manure was applied to defendants' field, and that testimony is insufficient to find a CWA violation.

I conclude that the jury's finding of a discharge on July 12, 1989 and August 22, 1989 "was sheer surmise and conjecture." *Mattivi*, 618 F.2d at 167 (quoting *Armstrong v. Commerce Tankers Corp.*, 423 F.2d 957, 960 (2d Cir.), *cert. denied*, 400 U.S. 833, 91 S.Ct. 67, 27 L.Ed.2d 65 (1970)). There was simply a "complete absence of substantial evidence supporting the verdict" on this question, *id.* at 169, and the verdict must therefore be set aside as to these two CWA violations.

3. *September 26, 1990 and April 15, 1991 CWA Violations*

Defendants argue that the September 26, 1990 and April 15, 1991 discharges were "agricultural stormwater discharges," which are specifically excluded from the definition of "point source," 33 U.S.C. § 1362(14), and hence from the coverage of the Act itself, since only point source discharges of pollutants constitute violations of the Act.

Sally Hunt, a non-party to this action, was called as a witness by plaintiffs. She testified that on September 26,

1990, she observed an application of liquid manure by defendants on a field adjacent to her property. She said that this application was heavier than most, and that the manure "pooled in the corner of [defendants'] field right next to [her] property." Def.Ex. C at 4. She stated that later that day it rained, and the manure "drizzled into the ditch and through the drainage pipe." *Id.*

Bly testified that on September 26, as he was driving near fields surrounding the Hunt residence, he "could see the manure flowing, the tracks made by the equipment, flowing off the end of the fields where there was severe erosion [sic]." Bly Tr., Apr. 30, 1993, at 16. He did not see any tankers. He also noticed that there was discolored water flowing through a ditch along the field. *Id.* at 17.

As to the April 15, 1991 incident, Hunt testified that on that date, defendants "had worked the field and worked all the grass off up to the ditch. And so then they spread manure, and it subsequently rained, and it washed into the ditch." Def.Ex. C at 8. When asked if she had personally observed the manure being washed into the ditch, she replied, "Not myself, but I know they spread it." *Id.*

Plaintiff Bly testified that April 15 was "a wet day" and that a photograph he took that day depicted "water flowing—water runoff flowing off the field towards the fencepost." Def.Ex. B at 38-39. Other photographs taken that day showed a "close-up of the water run-off showing the brown water, foam in the field," a "stream in Letchworth Park, several yards from the field, which the run-off was coming from showing brown, yellow water and foam." *Id.* at 39.

Plaintiff Karcheski also testified about his observations on April 15. He stated that near the intersection of Middle Reservation and Swyers Roads, he saw "a lot of manure coming off the field through the areas where the banks had fallen away and like, you know, tractors had come in and

out, and they leave culverts or furrows and that." He saw "water and manure" in an adjacent ditch. Karcheski Tr. Apr. 28, 1993 p. 20. He stated that "[t]he ground was wet, but [he did]n't recall it raining when [he] was there." *Id.* p. 21.

In addition to this live testimony, two reports prepared by the New York State Department of Environmental Conservation ("DEC") were admitted into evidence. The first, which was prepared in response to a complaint by Hunt to the DEC, stated that "Due to heavy rain in area about 2 PM on 9/26/90—Runoff from fields on north side of Swyers Rd. cause[d] manure to run into road ditch. Drainage enters Genesee River through Letchworth State Park property." Def.Ex. G.

The second report was written after an investigation of a complaint by Bly on April 15, 1991. That report stated that "Heavy rain caused manure to run off into streams through park into Genesee River." Def.Ex. G.

In my view, the evidence does not support the verdict as to either of these two discharges. First—particularly concerning the April 15 discharge—there was insufficient evidence that any discharge occurred from a point source. Bly's testimony that he saw "water runoff flowing off the field," in fact, supports precisely the opposite view: that the discharge on this date was simply disparate run-off caused by rainfall. The DEC report was consistent with Bly's testimony, stating only that manure had run off into streams.

Hunt's testimony about the April 15 incident was also inadequate. Although she said that manure had "washed into the ditch," the basis for that statement is not apparent, since Hunt then said that she had not "personally observe[d] it being washed into the ditch," but only that she "kn[e]w they spread it" and she "kn[e]w there was no vegetation" on the field. Def.Ex. C at 8.

Karcheski's testimony was unclear at best as to what caused the alleged discharge. However, his statements that the ground was wet and that there was water in the ditch adjacent to the field, and that "the banks [we]re crumbling down into the ditch," Karcheski Tr. Apr. 28, 1993, p. 28, taken together with Bly's and Hunt's testimony, indicates that this was run-off rather than a point source discharge.[3]

There was virtually no evidence at all, then, that a point source discharge occurred on April 15. Hunt had no personal knowledge that a discharge occurred from a point source, Karcheski's testimony was inconclusive, and Bly's testimony actually supported defendants' position.

The evidence concerning the September 26 discharge is of a different nature, but no less problematic. Hunt did testify that the manure had "pooled" near the edge of the field and, when it rained, the manure "drizzled into the ditch and through the drainage pipe." The DEC report also indicated that the manure had entered streams through a ditch.

There was some evidence, then, that the manure had collected into a pool on defendants' property and that it entered navigable waters through a discrete conveyance, *i.e.*, the ditch.

The inquiry does not end there, however, for in 1987 Congress amended the Act to exclude agricultural stormwater discharges from the definition of "point source." 33 U.S.C. § 1362(14). The question, therefore, is whether the September 26 discharge fell within that exclusion.

Unfortunately, neither the Act itself, the regulations promulgated by the Environmental Protection Agency

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[3] In addition, even if Karcheski's testimony would support an inference that the April 15 discharge was not mere run-off, this discharge fell within the statutory exception for agricultural stormwater discharges, as discussed in detail *infra*.

("EPA"), the legislative history, nor the case law provides much guidance as to the meaning of "agricultural stormwater discharge." The term is not defined in the Act or in any regulations, although "storm water" is defined at 40 C.F.R. § 122.26(b)(13) as "storm water runoff, snow melt runoff, and surface runoff and drainage."

The legislative history is both sparse and unhelpful, stating only the obvious: that the new language "amends Section 502(14), of the Act, by providing that Agricultural Stormwater Discharges are not defined as a point source." Section-by-Section Analysis, 133 Cong.Rec.H 131 (Jan. 7, 1987), *reprinted in* 1987 U.S.C.C.A.N. 5, 41. Also, the parties have not submitted, and the Court has not found, any cases interpreting this exception.

Nevertheless, both common sense and what little authority there is in this area dictate that the September 26 discharge does fall within the exception. First, the fact that Congress saw fit to add this language to § 1362(14) suggests that Congress believed that, without an express exception, agricultural stormwater discharges *could* be considered point-source discharges. In other words, the amendment excepted from the scope of the Act certain discharges which would otherwise constitute point-source discharges.

That view is reinforced by certain other amendments enacted in 1987 dealing with other, non-agricultural stormwater discharges. For example, § 1342(l) was amended to provide that permits are not required for discharges through discrete conveyances of stormwater runoff associated with certain types of industrial activity, so long as the water is uncontaminated by contact with raw materials or certain specified other types of materials. Presumably, contaminated industrial stormwater discharges would continue to require permits. Since non-point source discharges do not require permits to begin with, this implies that Congress considered discharges of industrial stormwater to be point-source

discharges; it was merely exempting some of them from the permit requirement.

With agricultural stormwater discharges, however, Congress went even further, and excluded them completely from the definition of point-source discharges. Agricultural discharges, then, are not simply point-source discharges that do not require a permit; they are not point-source discharges at all, notwithstanding that they might occur through a discrete conveyance.

The fact that Congress saw a need to amend the statute to add a specific exception for agricultural stormwater discharges also suggests that Congress was not concerned simply with disparate, random run-off of rain water; that type of run-off had already been generally held by the courts not to constitute a point-source discharge. *See, e.g., United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). If that had been Congress' only concern, the exception would have been unnecessary. It is a fundamental rule of statutory construction that courts should avoid an interpretation of a statute that renders any part of it superfluous. *State of Nevada v. Watkins*, 939 F.2d 710, 715 (9th Cir. 1991).

It appears, therefore, that the exception was aimed at *collected* or *channelled* storm water, *i.e.*, storm water discharges which would ordinarily constitute point-source discharges. The fact that the discharge in this case came from a "pool" or ditch, therefore, does not in itself take this case out of the statutory exception created by Congress for agricultural stormwater discharges.

Plaintiffs' contention that "stormwater" means only run-off which is completely unpolluted by contact with any contaminants is not persuasive. Plaintiffs rely for that assertion on a statement by the EPA in the preamble to a Federal Register notice of certain regulations that "some classes of nonstormwater discharges may typically contain

only minimal amounts of pollutants." Congress did not intend that the term stormwater be used to describe any discharge that has a de minimis amount of pollutants. 55 F.R. 47995 (Nov. 16, 1990). That statement, however, can reasonably be read to mean only that the mere fact that a discharge contains a de minimis amount of pollutants does not necessarily mean that it should be treated as a stormwater discharge. In other words, the stormwater or non-stormwater character of the discharge is not determined by the presence or amount of pollutants in the discharge.

Moreover, "storm water," according to the EPA, means "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). "Runoff" has been defined by the Court of Appeals for the District of Columbia Circuit as "wastewaters generated by rainfall that drain over terrain into navigable waters, *picking up pollutants along the way*." *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). That interpretation is almost self-evidently correct, as it seems virtually impossible for rain water to travel over the ground without picking up at least a minimal amount of pollutants. To think of "stormwater" as including only "pure" rain water unadulterated by any substances on the ground whatsoever would render the agricultural stormwater discharge exception practically meaningless.[4]

The cases cited by plaintiffs in support of their interpretation of this exception are distinguishable. Some of the cases, such as *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980), and *Residents Against Industrial*

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[4] Title 33 U.S.C. § 1342(l) does speak of "uncontaminated" industrial stormwater discharges, but that adjective is qualified in that the reference is to stormwater uncontaminated by contact with certain specific types of materials. Presumably, then, stormwater "contaminated" by contact with materials other than those listed is not covered by that section.

Landfill Expansion v. Diversified Systems, Inc., 804 F.Supp. 1036, 1039 (E.D.Tenn. 1992), did not involve agricultural activities. Some, including *Abston* and *United States v. Oxford Royal Mushroom Products*, 487 F.Supp. 852 (E.D.Pa. 1980), were decided *before* the 1987 CWA amendments which created the exception for agricultural stormwater discharges.

Plaintiffs maintain that a discharge, even if its most immediate cause was rainfall, does not fall within the exception if defendants' activities (such as prior applications of manure) contributed to the discharge. This argument, however, confuses the issue of run-off-versus-point source discharges with the issue of agricultural stormwater discharges. The cases cited by plaintiffs (including my summary judgment decision in this case) addressed the question of when runoff has been sufficiently affected by man to become a point source discharge. That is an entirely different issue from whether a discharge comes within this exception for agricultural stormwater discharges.

Plaintiffs also argue that to hold that the discharges in this case were agricultural stormwater discharges would allow defendants to escape liability under the Act by watching the weather forecasts and applying manure just before a rainstorm. Defendants' liability, though, will not be made limitless by my decision. For example, defendants cannot simply dump a truckload of manure into a storm sewer or ditch and claim that that is an agricultural stormwater discharge, since in that situation the discharge would clearly have been caused by defendants, not by the effects of natural precipitation. In contrast to that scenario, the instant case involves manure lawfully and legitimately applied to defendants' land in the court of agricultural activity, which, as far as the proof showed, would have remained on their land had it not been for a heavy rain.[5] If this activity does

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[5] Although Bly did not testify that the discharge was caused by

not fall within the exception for agricultural stormwater discharges, it is difficult to see what would. This is not a case like *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055 (5th Cir. 1991), in which the defendants deliberately cut a spillway out of the embankment of a wastewater holding pond after the pond had become full due to heavy rains.[6] The discharge here involved the natural movement of rain water over the ground, albeit rain water which mixed with manure before running off the field into a ditch. To hold that a point source discharge exists when rain water flows across a farm field and picks up or mixes with fertilizer, however, would have far-reaching effects that I believe were precisely what Congress wanted to avoid when it added this exception for agricultural stormwater discharges.

It is evident that Congress had a definite purpose in mind when it enacted this exception, and that purpose was clearly to exempt certain farming activities from the reach of the Clean Water Act, either because of the importance of those

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rain, he apparently witnessed the discharge some time after the manure had been spread, since he said that he saw no tankers in the field at the time. His statement that water was flowing through the ditch also suggests that he arrived after the rain had begun. Thus, his observations, as far as they went, were consistent with Hunt's.

[6] It should also be noted that the farm in *Carr* was held to be a "concentrated animal feeding operation," which *per se* made it a point source. 33 U.S.C. § 1362(14). The court in *Carr*, therefore, was not faced with the question of whether the discharges were agricultural stormwater discharges.

In the instant case, I declined to give an instruction on concentrated animal feeding operations because the proof showed that crops were sustained over a portion of Southview Farm, which took it out of the definition of that term. 40 C.F.R. § 122.23(b)(1).

activities to society, or because of the difficulty of regulating them, or both. It is not the function of this court to decide whether this exception is good or bad, or wise or unwise. Rather, the court's task is to apply the statute to the facts before me, and having done so, I find that the only reasonable conclusion is that the discharges here fall within the exception.

I am aware that the jury was instructed that agricultural stormwater discharges are not covered by the Act, and that a jury verdict is not lightly to be set aside. When the facts demand it, however, that is the duty of the court. In fairness to the jury in this case, it should also be noted that (as the preceding discussion should make plain) this is not a simple, straightforward matter in which any layman can easily judge the facts according to his common sense. The parameters of this part of the Act are complex and largely uncharted. That the jury's verdict is insupportable, therefore, is probably less the result of faulty reasoning on their part than a testament to the exceedingly difficult task given them of trying to grasp the subtleties of a labyrinthine statute such as the CWA based solely on a jury charge, a task compounded by the fact that this was merely one issue among many presented to them at the end of the case.

In any event, in my view the evidence was such that no reasonable juror could find that these discharges were not excepted under the Act as agricultural stormwater discharges.

4. *Point Source Discharge*

Defendants also contend that plaintiffs did not prove that any of the five alleged discharges occurred from a "point source," which is defined as "[a]ny discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A discharge of pollutants does not violate the Act unless it emanates from a point source.

My ruling on the July 12 and August 22, 1989 discharges makes this issue moot as far as those two alleged violations are concerned. There was insufficient evidence of any discharges on those two days, from a point source or otherwise. Likewise, I have already held that the September 26, 1990 and April 15, 1991 discharges were agricultural stormwater discharges, and therefore were not point-source discharges.

That leaves only one discharge, on July 13, 1989. As to that event, Karcheski testified on direct examination as follows:

> Q. Did you observe any of the manure that was there exiting the property?
>
> A. In the ditch.
>
> Q. All right.
>
> A. We didn't notice much on the hills, because it was like—it wasn't solid stuff. It was just running off, and it was in the ditch, and Kirk [Bly] had come up from that way and said he had been following it down the ditch.

Karcheski Tr. 4/28/93 at 8-9.

Describing his observations on July 13, Bly testified that

> As I approached the southeast corner of the field, it was evident that a lot of manure had been applied, and I was starting to walk through a slurry type manure that was flowing under the fence through the ditches and the field. . . . I followed this flow, this lava-like flow of manure down into the park where it meets a small stream and followed that stream even farther to where it meets another stream.
>
> Q. Where does that stream go to?
>
> A. That stream flows approximately a quarter mile to the Genesee River.

Bly Tr. 4/30/93 at 9.

Bly also testified that

> [m]anure was flowing off the hilly areas of the field and down into the low spots under the fence, off the field. . . . I continued along the woods in the park to the easterly side of the field and witnessed another event similar to the one on the southeast side, the manure flowing off at a low spot in the field, a depression into another small stream . . .

Id. at 9-10. He stated that he followed the manure in the stream "in [Letchworth] park several hundred yards." *Id.* at 10.

Defendants raised the point-source issue on their prior motions to dismiss and for summary judgment. I denied those motions on the ground that there were issues of fact about whether a point-source discharge occurred. Plaintiffs having presented their proof at trial, the question now becomes whether the evidence is sufficient to find that the July 13 discharge was from a point source.[7]

The Second Circuit recently decided a case which further delineates the nuances of the term "point source." In *United States v. Plaza health Labs., Inc.*, 3 F.3d 643 (2d Cir. 1993), a two-judge majority held that the district court in a criminal CWA case had erred in ruling that a human being could be a point source.

Although my prior decisions in this action dealt with the point-source issue at some length, the *Plaza Health* decision necessitates some further discussion of the subject, not only

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[7] Rather that decide this issue after closure of the proof but before the case went to the jury, following clear Second Circuit directives, *see Mattivi v. South African Marine Corp. "Huguenot"*, 618 F.2d 163, 166 (2d Cir. 1980); *Gratian v. General Dynamics*, 587 F.2d 121 (2d Cir. 1978), I submitted the issues to the jury and left the matters to be resolved on post-verdict Rule 50 motions.

because it is the Second Circuit's most recent pronouncement on the question, but also because it modifies in some respects the contours of the case law in this area.

In reaching its conclusion that a person cannot be a point source, the Court of Appeals noted that the "Clean Water Act generally targets industrial and municipal sources of pollutants . . ." 3 F.3d at 646. The court stated that this focus is evidenced in part by the many references in the Act to "owners or operators" of point sources.

The court found further support for this view in the legislative history of the CWA. As an example, the court quoted a Senate report referring to the need to distinguish control of runoff from control "where there are *specific confined conveyances, such as pipes . . .*" *Id.* at 647 (quoting S.Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3744) (alteration in original). The court went on to quote the following comments of Senator Robert Dole which were added to the report:

> Most of the problems of agricultural pollution deal with non-point sources. Very simply, a non-point source of pollution is one that does not confine its polluting discharges to one fairly specific outlet, such as a sewer pipe, drainage ditch or a conduit; thus, a feedlot would be considered to be a non-point source as would pesticides and fertilizers.

The court concluded that the term "point source" as applied to a human being was at best ambiguous, and that the rule of lenity in criminal cases required a reversal of the defendant's conviction.

In a dissenting opinion, Judge Oakes stated that the term "point source" has been applied to a wide range of polluting techniques, a common feature of which is that the pollutants "reach the navigable waters by human effort or by leaking from a clear point at which waste water was collected by human effort." 3 F.3d at 651.

Judge Oakes also considered what constitutes a nonpoint source discharge, which, he stated, "is, generally, runoff: salt from roads, agricultural chemicals from farmlands, oil from parking lots, and other substances washed by rain, in diffuse patterns, over the land and into navigable waters." 3 F.3d at 652. To attempt to control such discharges, he stated, "could require radical changes in land use patterns which Congress evidently was unwilling to mandate without further study." *Id.*

Despite Judge Oakes's dissent, it is clear from reading both the majority and dissenting opinions in *Plaza Health* that the entire court did agree on one thing: that a point source, as the Act itself states, must be "discrete" and "confined." In fact, Judge Oakes opined that persons may be *non*point sources when they deposit waste in a diffuse manner, such as when they "spread fertilizer on the ground or deposit oil in a driveway, leaving it to be washed into nearby rivers." 3 F.3d at 655 n.6. Similarly, in stating that the Act should be held to cover "a company [which] chooses to use the nation's waters as a dumpsite for waste it has created and gathered in a manageable place," Judge Oakes added in a footnote, "I mean to distinguish a company whose agricultural or other activity leaves pollutants dispersed on the land, which may then find their way into the nation's waters." 3 F.3d at 655 n. 7. It is evident that even Judge Oakes would not find such an entity liable under the CWA.

Several points may be drawn from *Plaza Health*. First, the court appears to have stepped back somewhat from the line of cases which have taken an expansive view of "point source." It is true that the court distinguished some of those cases on the ground that *Plaza Health* was a criminal case in which the rule of lenity applied, but the court did not state that it would have reached a different conclusion in a civil case. Also, while it would be an exaggeration to say that the court adopted a restrictive reading of "point source," *Plaza Health* did set some limits on the applicability of that term,

even where the means of conveyance of a pollutant is discrete, as a human being surely is.

Second, *Plaza Health* emphasized that the focus of the CWA is on industrial and municipal polluters. Although the court was primarily concerned with distinguishing individual human polluters, it is also true that the Act is aimed more at industrial and municipal polluters than at agricultural polluters.[8] The Act specifically protects certain agricultural activities, notably in the exceptions for irrigation return flows and agricultural stormwater discharges.

The timing of the adoption of the irrigation exception is also indicative of Congress' concern with limiting the reach of the Act in the field of agriculture. On November 16, 1977, the Court of Appeals for the District of Columbia Circuit issued a decision holding that the EPA lacked authority to exclude irrigation return flows from the definition of "point source." *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The amendment inserting the irrigation exception in the Act was enacted by Congress the very next month. Pub.L. 95-217, § 33(b), 91 Stat. 1577 (Dec. 27, 1977).

It is true, of course, that the Act does not provide a blanket exception for *all* agricultural activities. In particular, it includes a "concentrated animal feeding operation" within the definition of "point source." 33 U.S.C. § 1362(14). Yet even this is equally *ex*clusive as it is *in*clusive. Just as the definition of "point source" effectively defines by exclusion "nonpoint source," *i.e.*, every source of pollutants that is not a point source,[9] so the definition of "concentrated animal

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[8] Judge Oakes was in agreement with the majority on this point as well; he stated that "disposers of industrial and municipal waste . . . were the principal targets of the authors of the CWA . . ." 3 F.3d at 655.

[9] *See Plaza Health*, 3 F.3d at 652 n.2 ("The cases and

feeding operation" as a lot or facility where more than 700 adult dairy cattle are kept for at least forty-five days in any twelve-month period, and where crops are not grown over any portion of the lot or facility, obviously leaves out many types of cattle operations. 40 C.F.R. § 122.23(B)(1), § 122.23(b)(3).

In drafting the CWA, then, Congress took pains to protect certain types of agricultural activities from the controls placed on point sources. In part, that appears to be a product of Congress' belief that most agricultural pollution either comes from nonpoint sources, or poses problems of management similar to those of nonpoint sources, which simply do not lend themselves to the kind of control that the CWA provides for with respect to industrial and municipal point sources.[10]

It is also noteworthy that Congress enacted these protections for agriculture despite, and quite likely because of, the enormity of the problem posed by nonpoint source pollution in general, and agricultural pollution in particular.[11] There can be no doubt that Congress has

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commentators all seem to assume that all water pollution is either point source pollution or nonpoint source pollution") (Oakes, J., dissenting); George A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law,* 23 U.C. Davis L.Rev. 461, text accompanying n. 83 (1990) ("The Act does not define 'nonpoint source,' but theoretically this would include any water pollution not caused by a point source").

[10] For example, in enacting the irrigation exception, Congress appears to have shared the EPA's concern that regulation of irrigation return flows would place an 'extraordinary burden" on the EPA, which would otherwise have faced the "spectre of millions of applications for permits . . ." *Natural Resources Defense Council*, 568 F.2d at 1377.

[11] *See* 2 William H. Rodgers, Jr., *Environmental Law: Air and*

become increasingly aware both of the extent of the nonpoint source pollution problem, and of the role played by agriculture in that problem.

As enacted in 1972, the CWA asked states to draft waste treatment management plans, which would include procedures for identifying nonpoint source pollution from various activities, including agriculture. 33 U.S.C. § 1288(b)(2)(F). In 1977, Congress added the Rural Clean Water Program, which sought to provide financial incentives to farmers to implement "best management practices" in controlling nonpoint source pollution from their land. 33 U.S.C. § 1288(j). A 1985 Senate Report stated that it had become "clear that nonpoint source pollution could no longer be ignored. . . . As point sources are brought under control, nonpoint pollution looms as a larger and larger problem." S.Rep. No. 50, 99th Cong., 1st Sess. 7-8 (1985) (quoted in Robert D. Fentress, Comment, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited?*, 19 Envtl.L. 807, text accompanying n. 57 (1989)). In 1987, Congress passed the Water Quality Act, which declared a "national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. § 1251(a)(7). The 1987 amendments set up additional state nonpoint source management programs. 33 U.S.C. § 1329.

What is also apparent, however, is that Congress has been reluctant to attempt outright federal control of agricultural

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Water § 4.9 at 124-25 (1986) (noting estimates suggesting that "nonpoint sources account for up to 99 percent of suspended solids and usually between 50 to 90 percent of other conventional pollutants"); Davidson, *supra*, text accompanying n. 10-11 ("[A]gricultural practices are the principal source of nonpoint source pollution . . .").

and other nonpoint source pollution, preferring instead to leave most of the responsibility in this area to the states, and to use incentives rather than compulsion. Fentress, *supra*, text accompanying n. 85 (noting more "carrots" than "sticks" in provisions dealing with nonpoint sources). Regarding the irrigation return flow exemption, one commentator has even stated that "the drafters intended all agricultural drainage to be excluded from regulation and, as nonpoint sources, to be covered instead only by the informal planning processes" provided for elsewhere in the Act. John H. Davidson, *Thinking About Nonpoint Sources of Water Pollution and South Dakota Agriculture*, 34 S.D.L.Rev. 20, text accompanying n. 114 (1988/1989).

With these considerations in mind, I conclude that the evidence in this case was not sufficient to establish that the July 13 incident was a point source discharge. The pollutants witnessed by Bly and Karcheski that day consisted of diffuse runoff, and in my view this was not the sort of pollution that Congress intended to be covered by the Act.

The linchpin of plaintiffs' attempt to show that this was a point source discharge is the reference by Bly and Karcheski to a "ditch," which is part of the Act's definition of a point source. 33 U.S.C. § 1362(14). The term "ditch" suggests a discrete channel; the most apt definitions of "ditch" in Webster's Third New International Dictionary (1981 ed.) are "a long narrow excavation dug in the earth," "a trench for conveying water for drainage or irrigation," and "a natural or artificial usu. narrow watercourse or waterway."

The record, however, shows that on July 13 the liquid simply, and quite naturally, flowed to and through the lowest areas of the field. Describing the "ditch," Karcheski said that "there's kind of like two rises, and like a ditch . . . A low area running in between . . ." Karcheski Tr. 4/28/93 at 6. Similarly, Bly stated that "Manure was flowing off the hilly areas of the field and down into the low spots under the fence, off the field." Bly Tr. 4/30/93 at 9-10. He said that

at another part of the same field, he saw "the manure flowing off at a low spot in the field, a depression into another small stream . . ." *Id.* at 10.

The photographs taken by Bly of the October 4, 1991 incident, which occurred at the same area as the July 13, 1989 event, and which was intended to establish that the violation at that field was a continuing one, also do not reveal any "ditch." It appears only that there were some gentle rises or slopes in the field, which of course means that there were relatively low spots as well. Plaintiffs' Ex. 77.

The testimony and photographs do indicate that the liquid eventually flowed off the field into a small stream or rivulet. This stream, however, appears to have been a natural watercourse, which in turn led to other streams and eventually into the Genesee River.

The question, therefore, is how the pollutants reached this stream, and I find that they did so in too diffuse a manner to create a point source discharge. The liquid manure was spread on the field, some of it settled into low-lying areas, and some eventually reached the stream.

The type of discharge lacks some of the essential elements of a point source discharge. The pollutants in this case were not "collected" by human activity; in fact, the opposite occurred—the manure was dispersed over the ground. Further, once the manure was spread, defendants made no effort to collect or channel it. They did not pour it into a pool or lagoon, for example, nor did the field have any sort of berm or dike intended to make it a self-contained system. This case therefore contrasts with *Oxford Royal Mushroom Products*, 487 F.Supp. 852, in which the waste water was supposed to remain within the field, but flowed out through a break in the surrounding berm.

In short, there was no "system" here, no "physical structures and instrumentalities that systematically act[ed] as a means of conveying pollutants . . . to navigable

waterways." *Plaza Health*, 3 F.3d at 646. As one commentator has observed, a "man-induced gathering mechanism plainly is the essential characteristic of a point source," 5 Robert E. Beck, *Waters and Water Rights*, § 53.-01(b)(3) at 216-17 (1991). Such a "mechanism" was absent here.

Furthermore, I do not believe that the vehicles or other devices used to spread the manure on the fields can be considered point sources under these facts. For one thing, they were not "gathering mechanisms" discharging pollutants into navigable waters. Rather, they dispersed the fertilizer onto the *ground*, some of which eventually reached waterways.

This is not to say that polluters may always escape liability under the Act merely by dumping pollutants on the ground. There may be situations where the casual connection is so immediate that the spreading mechanism could be deemed a point source, as, for example, where the pollutant is poured onto a dike at the edge of a river. In this case, though, the connection between defendants' activity and the alleged discharge was too far-removed to consider the tractors or spreaders as point sources. Virtually every manmade pollutant at some time was gathered or collected somewhere, and if a point source discharge could be found merely by tracing the pollutants back to the time at which they were last collected, practically every discharge would be a point source discharge. For example, solid fertilizer sold in bags may have been stored in a shed or truck before being spread on the fields. Surely neither the shed nor the truck would be considered a point source in this scenario.

I also believe that defendants' actions here were the kind of activity that Congress wanted to keep beyond the reach of the Act. The manner in which the manure was spread, and entered the waterways, presents many of the same characteristics of agricultural pollution in general which Congress has found inappropriate for point-source-based, or

"end of pipe" controls. On any given day, farmers throughout the country may be applying fertilizer to their fields. Some chemicals from that fertilizer may end up in navigable waters.[12] Trying to trace those chemicals to particular fields or applications, and determining whether the discharges were due to an overapplication of fertilizer, to irrigation return flows, or to stormwater runoff, would impose immense problems.

In that sense, these manure applications were similar to irrigation return flows. Speaking of the exemption for the latter, one writer has stated that

> [t]estimony in field hearings suggested that effluent limits based on technological methods may not be appropriate for control of return flow pollutants and the [Senate] committee determined that these sources were practically indistinguishable from any other agricultural runoff, which may or may not involve a similar discrete point of entry into a watercourse. All such sources, regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F).

Davidson, supra, text accompanying n. 115 (citing S.Rep. No. 370, 95 Cont., 1st Sess. 35 (1977)).

In short, Congress believed that control of this kind of pollution could best be accomplished not through conventional technology-based systems, but through "radical changes in land use patterns" which Congress has sought to encourage, but which thus far it has been "unwilling to mandate without further study." *Plaza Health*, 3 F.3d at 652-53 (Oakes, J., dissenting).

---

[12] *See* Gould, *supra*, text accompanying n. 57 (citing evidence that "half the nitrogen applied to fields does not reach the plants but enters streams and groundwater").

I reach this conclusion cognizant of my prior rulings that there were sufficient questions of fact on this issue to overcome defendants' summary judgment and dismissal motions. My decision today does not repudiate those prior rulings. A denial of summary judgment in no way precludes a subsequent entry of judgment as a matter of law after the evidence has been heard at trial, *see, e.g., Voutour v. Vitale,* 761, F.2d 812, 822 (1st Cir. 1985), *cert. denied,* 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986); *Catts Co. v. Gulf Ins. Co.,* 723 f.2d 1494, 1502 (10th Cir. 1983), and I do not hold that under *no* set of facts could plaintiffs have prevailed on this issue, or that a discharge of manure can never be a point source discharge. This decision today is based on the evidence actually presented at trial; that evidence did not show a point source discharge.

In sum, I find that there was insufficient evidence to prove that pollutants were discharged from a point source on July 13, 1989 from defendants' fields, as required for a CWA violation.

5. Trespass Claim

Defendants maintain that the trespass claim should be dismissed because the testimony of plaintiffs' experts was insufficient to establish that defendants' manure was responsible for nitrates in plaintiffs' wells. Specifically, defendants contend that the expert testimony was too speculative and was not supported by adequate facts, and that the testimony of one expert, Dr. Jeffrey Chiarenzelli, was impermissibly based on the opinion of the other expert, Dr. Dale Baker.

The portions of the trial transcript submitted by defendants in support of their motion reveal that defendants did not object to the testimony that they now seek to challenge. *See* Def.Ex. J,K. To the extent that defendants contend that the testimony of these two men was not admissible, then, I find that defendants waived this issue by failing to make a timely

objection at trial. *See United States v. Bilzerian,* 926 F.2d 1285, 1294-95 (2d Cir.) (since expert's general testimony was not objected to at trial, admissibility issue was waived), *cert. denied,* — U.S. —, 112 S.Ct. 63, 116 L.Ed.2d 39 (1991).

I also reject defendants' argument that the expert testimony was insufficient to support the jury verdict on the trespass claim. Defendants are incorrect in their assertion that plaintiffs' experts' opinions were based wholly on speculation or conjecture unsupported by any facts or data.

Baker, for example, opined that Southview's manure application caused nitrates to enter ground water through a process known as nitrification. He stated that this process is caused by microorganisms, and occurs at temperatures above fifty degrees. Def.Ex. J at 25. He also stated that these nitrates will enter the ground water if there are no crops present to take up the nitrates, and that because nitrates are water soluble, "if water moves, nitrates move with it. There's no retardation of the nitrates by the soil." *Id.* at 26.

Chiarenzelli based his opinion that nitrates found in the plaintiffs' wells had come from Southview Farm on his understanding of water flow and the topography of the area in question. Def.Ex. K at 105-06. He explained how he arrived at his opinion, and his testimony was not simply unsupported speculation.

Defendants' argument that Chiarenzelli's opinion was worthless because it was based on the opinions of Baker is without merit. Baker stated that he believed that the nitrates in the plaintiffs' wells came from Southview because Southview was "the only significant nitrate source up-gradient of the plaintiffs' wells." Def. Ex. K at 105.

I note again that defendants made no objection to the admission of this opinion on this ground at trial. They therefore waived any argument that the testimony was inadmissible. *Bilzerian,* 926 F.2d at 1294-95.

Second, the only authority offered by defendants for the proposition that an expert cannot base an opinion on the opinion of another expert, *United States v. 102.93 Acres of Land*, 154 F.Supp. 258 (E.D.N.Y. 1957), *aff'd*, 257 F.2d 805 (2d Cir. 1958), is distinguishable in that the expert in that case based his conclusions on "the advise and counsel of others who were *not* called as witnesses." *Id.* at 261 (emphasis added). Thus, that case implicated a concern that was not present in the instant case, namely, the inability of the adverse party to cross-examine the expert whose opinions underlie the witness' opinion. Baker testified that Southview was indeed a source of nitrates, and defendants had the opportunity to, and did, cross-examine him concerning that opinion. *Cf. American Bearing Co. v. Litton Indus., Inc.*, 540 F.Supp. 1163, 1172 (E.D. Pa. 1982) (finding inadmissible economist's testimony based on alleged out-of-court statement of another expert who testified prior to economist, since other expert made no such statement when testifying, and defendant had no opportunity to cross-examine him about it.)

Moreover, *102.93 Acres* was decided prior to the adoption of the Federal Rules of Evidence, which expressly permit an expert to based an opinion even on otherwise inadmissible evidence if that evidence is "of a type reasonably relied upon by experts" in the same filed. Fed.R.Evid. 703. This rule has been held to permit an expert in one field to base on opinion in part on the opinions of other experts in other fields. *See United States v. 1,014.16 Acres of Land*, 558 F.Supp. 1238 (W.D.Mo. 1983), (real estate appraiser could consider opinions of forester and hydrologist in arriving at estimate of property's value, and forester could consider hydrologist's data to frame opinion on effect flooding would have on foliage), *aff'd*, 739 F.2d 1371 (8th Cir. 1984).

This view is perfectly sensible. As the district court observed in *1,014.16 Acres*, "[a]n expert cannot be an expert in all fields, and it is reasonable to expect that experts will

rely on the opinions of experts in other fields as background material for arriving at an opinion." 558 F.Supp. at 1242.

The import of Chiarenzelli's testimony, then, was merely that if one accepted Baker's opinion that nitrates from Southview entered streams and ground water, those nitrates would tend to be carried toward plaintiffs' property. If the jury did not credit Baker's opinion that the water contained nitrates, they simply would have been unconcerned with the direction of the flow of the water. This was effectively no different from having an expert given an opinion based on hypothetical facts, on the expectation that the jury will find those facts to exist in the actual case before them.

I am equally unpersuaded by defendants' argument that the experts were unable to state with certainty that there was a causal connection between defendants' activities and the nitrates in plaintiffs' wells. First, Baker did not need to testify on that matter. He was called to testify about the leaching of nitrates from manure into ground water, not about the movement of that ground water from defendants' to plaintiffs' property.

Defendants' argument that Baker's opinion was "totally speculative as evidenced by his statements that "it [nitrate] *probably* does [leach into the groundwater] by the time fall comes'...," Def. Mem. at 24, takes Baker's testimony out of context. Baker made this statement in response to a question whether "*all* of the nitrate that's left in the soil ... necessarily leach[es] into the ground water ..." Def.Ex. J at 77. He explained that when the weather turned cold in the fall, nitrification would be less likely to occur, so that some nitrates might remain in the soil. Merely because he did not state to an absolute certainty that one hundred percent of the nitrates present would have leached out of the soil by the end of the growing season did not render speculative his opinion that leaching did occur.

Similarly, Chiarenzelli's testimony was not merely speculative about the existence of a connection between nitrate contamination of plaintiffs' wells and defendants' activities at Southview Farm. At one point during cross-examination, defense counsel asked him, "But you concluded that it was highly likely [that there was a connection], even though you could not establish a direct connection; isn't that correct?" Chiarenzelli responded, "Right, you can almost never establish a direct connection." Viewed in context, Chiarenzelli's testimony did not mean that he was simply guessing about this matter; as defense counsel himself stated, Chiarenzelli had "concluded that it was highly likely that there was a causal connection." Def. Ex. K at 135. Furthermore, Chiarenzelli stated earlier in his testimony that in his opinion, "the nitrates in the plaintiffs' wells can only be coming from fields owned, rented and operated by Southview Farm." *Id.* at 105. His statement about never being able to establish a direct connection, then, could reasonably be taken to mean only that it was virtually impossible to prove the connection beyond all doubt, and that it was necessary to infer the connection from circumstantial evidence.

I conclude that Baker's and Chiarenzelli's testimony was properly before the jury and that it gave the jury a sufficient basis for their verdict on the trespass claim. Defendants were free to explore further the foundation of the experts' opinions through cross-examination, and to argue before the jury at the close of the case that the experts were not worthy of credence. *See Daubert v. Merrell Dow Pharmaceuticals,* — U.S. —, —, 113 S.Ct. 2786, 2798, 125 L.Ed. 2d 469 (1993) (noting value of cross-examination and presentation of contrary evidence as preferred means of challenging value of expert testimony). Beyond that, the weight to be given the experts' opinions was for the jury to consider, and in my view this evidence was sufficient to support the verdict concerning the trespass claims.

CONCLUSION

Based on the jury verdict rendered on May 19, 1993, judgment is entered in favor of all the plaintiffs on their trespass claim in the following amounts:

Karcheski Family	$1000.00
Lois E. Link/	
Daniel L. Wilson	$1000.00
Fagan Family	$1.00
Ferris Family	$100.00
Kirk Schroeder	$1000.00
Bly Family	$1000.00

Defendants' motion for judgment as a matter of law is denied as to the trespass claim.

Based on the jury's verdict, judgment is entered in favor of defendants on plaintiffs' nuisance and negligence claims, and on plaintiffs' Clean Water Act claims with respect to the following dates: November 14, 1989; November 15, 1989; November 16, 1989; February 19, 1991; October 18, 1991; and July 23, 1992.

Defendants' motion for judgment as a matter of law is granted in part, and judgment is entered in favor of defendants on all of plaintiffs' remaining Clean Water Act claims, specifically: July 12, 1989; July 13, 1989; August 22, 1989; September 26, 1990; and April 15, 1991.

IT IS SO ORDERED.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

33 U.S.C. § 1311(a) provides:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1362(6) provides in relevant part:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(12) provides in relevant part:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source.

33 U.S.C. § 1362(14) provides:

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

40 C.F.R. § 122.23 provides in relevant part:

> (a) Permit requirement. Concentrated animal feeding operations are point sources subject to the NPDES permit program.
>
> (b) Definitions.
>
> (1) "Animal feeding operation" means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:
>
> (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
>
> (ii) Crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.
>
> * * *
>
> (3) "Concentrated animal feeding operation" means an "animal feeding operation" which meets the criteria in Appendix B of this part, or which the Director designates under paragraph (c) of this section.
>
> (c) Case-by-case designation of concentrated animal feeding operations.
>
> (1) The Director may designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollution to the waters of the United States.

40 C.F.R. § 122.3 provides in relevant part:

> The following discharges do not require NPDES permits:
>
> * * *
>
> (e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.
>
> (f) Return flows from irrigated agriculture.

40 C.F.R. § 122.26(13) provides:

> Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.

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No. 94-1316

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SOUTHVIEW FARM and RICHARD H. POPP,
Petitioners,

v.

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICUS CURIAE EQUIPMENT MANUFACTURERS INSTITUTE IN SUPPORT OF PETITIONERS

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---

BRIEF OF AMICUS CURIAE EQUIPMENT MANUFACTURERS INSTITUTE IN SUPPORT OF PETITIONERS

The Equipment Manufacturers Institute, *amicus curiae*, support the Petition for a Writ of Certiorari of Southview Farm and Richard H. Popp. All parties have consented to the filing of this brief, pursuant to Rule 37.3 of the Rules of this Court.

STATEMENT OF INTEREST

The Equipment Manufacturers Institute ("EMI") is the principal association in the United States representing manufacturers of farm, construction, forestry, ma-

terials handling, and utility equipment. EMI's concern is that the Second Circuit decision would impermissibly extend the Clean Water Act's permitting program for point sources to agricultural nonpoint sources. Contrary to clear Congressional intent, this unique decision would subject normal farming operations, and even tens of thousands of farm implements, to the cumbersome federal program.

SUMMARY OF ARGUMENT

In its decision below, the Second Circuit ruled directly contrary to Congressional intent and the settled expectations of farmers throughout the United States. Under the Clean Water Act, there is a clear distinction between point sources such as industrial and municipal discharges, which are subject to federal regulation, and nonpoint sources such as agricultural discharges, which are subject to state and local controls. Congress did not intend concentrated animal feeding operations, which are defined as point sources, to include dairy farms, such as Southview Farm, that grow feed crops as part of their operations.

Farm equipment and swales that do not directly discharge into navigable waters are not point sources subject to the permitting requirements of the Clean Water Act. Congress never intended them to be point sources, and over several decades governmental regulators and the agricultural community have never treated them as if they were point sources.

ARGUMENT

I. DAIRY FARMS GROWING FEED CROPS AS PART OF THEIR OPERATIONS ARE NOT CONCENTRATED ANIMAL FEEDING OPERATIONS UNDER THE CLEAN WATER ACT.

"Little Boy Blue come blow your horn,
The sheep's in the meadow, the cow's in the corn."

Even the characters in nursery rhymes know it is an agricultural calamity for sheep to get into the meadow or for cows to get into the corn. Yet the Second Circuit Court of Appeals, in a "city-slicker" decision reversing the District Court, would now require the cows to be kept in the crops in order that farmers retain their agricultural exemption under the Clean Water Act ("CWA").

From its beginning in 1972, the CWA has sharply distinguished between point sources and nonpoint sources. Point sources, namely industrial and municipal discharges, are subject to federal regulation, whereas nonpoint sources, principally agricultural discharges, are subject to state and local controls. *See* S. Rep. No. 370, 95th Cong., 1st Sess. at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4334. Industrial sources are typically concentrated, the "discernible, confined and discrete conveyance[s]" intended to be regulated as point sources. 33 U.S.C. § 1362(14) (1988). For point sources, federal discharge permits with specific effluent limitations are required. 33 U.S.C. § 1342 (1988). In contrast, agricultural sources are typically diffuse, and are considered nonpoint sources. For nonpoint sources, which include the diffuse and amorphous runoff from agricultural fields subject to the whims of nature, specific limits would be neither very practical nor very meaningful. Hence, most states do not require permits; instead, they establish good farming guidelines and practices designed to accomplish the same ends. 33 U.S.C. § 1329 (1988).

There is one exception: animal feedlots, which EPA terms "concentrated animal feeding operations" ("CAFOs"). 33 U.S.C. § 1362(14) (1988). These feedlots are special industrial-like facilities, which generally accept cattle from the farms in the surrounding region and fatten them for 60-120 days before they go to market. Feedlots typically have little or no land other than that used to hold livestock. These highly-concentrated operations can and do collect the resulting animal wastes for distribution as fertilizer elsewhere in the region or otherwise dispose of the waste. Although EPA regulations in 1975 set the lower limit for these facilities at a rather arbitrarily 700 mature dairy cattle or 1,000 slaughter and feeder cattle, feedlots typically contain thousands or tens of thousands of animals. There are also feedlots for swine and other animals, but the regulatory threshold numbers are different. *See* 40 C.F.R. § 122, App. B. Concentrated animal production where no crops are grown has long been recognized as more industrial than agricultural.

Under the regulations, farms having more than the threshold 700 dairy cattle are not automatically considered feedlots. They are designated as CAFOs only if they meet the following condition:

> Crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

40 C.F.R. § 122.23(b)(1)(ii) (1994).

Southview Farm is a modern farm of approximately 2200 acres, 1900 of which are used for growing crops or other purposes. It also maintains a herd of approximately 1290 milking cows, primarily housed in barns. As crops are grown on approximately 83 percent of the Southview Farm, the facility is obviously not a feedlot.

As an efficient farm, the dairy cows are fed crops grown on the farm, and their manure is used to replenish the fertility of the fields. That practice is in the best

environmental tradition of recycling natural products and using them as a substitute for chemical fertilizer. Under hazardous waste law, EPA has specifically exempted animal manures that are used as fertilizers from regulation as hazardous waste. 40 C.F.R. § 261.4(b)(2)(ii) (1994). This distinction can be critical. EPA distinguishes materials that are wastes, and subject to more stringent regulation from those that are recyclable materials or materials used as products, and subject to substantially more limited, if any, regulation. *Compare* 40 C.F.R. Part 264 (1994) (standards for owners and operators of hazardous waste treatment, storage, and disposal facilities) *with* 40 C.F.R. § 261.6(a)(3) (1994) (very limited requirements applicable to specified recyclable materials) and § 266.70 (1994) (limited requirements for recyclable materials used for precious metal recovery). Congress envisioned a similar distinction under the CWA. The manure is a valuable resource, best used as a fertilizer where it is needed.

The Second Circuit did not respect the distinction between dairy farms, where manure may be used on their own lands, and feedlots, where there is no other land and manure must be used as fertilizer off-site or otherwise disposed. The Circuit Court, without any statutory justification, decided the term "facility" applied only to the area where the dairy cattle were confined. That Court construed "facility", not in its normal sense as applying to the farm as a whole, but in such a narrow sense that a farm could have an infinite number of facilities. By thus arbitrarily dividing a farm into the dairy facility, the corn facility, the wheat facility, and any number of other such "facilities", any court might find that crops are not grown in the cattle facility. Since by this circular definition only dairy cattle were present in the cattle confinement area, no crops were grown in this sub-facility. This large, integrated farm was thus judicially transformed into a feedlot, subject to the jurisdiction of the CWA.

In order not to qualify as a CAFO under this strained interpretation, a farm would have either to raise cattle in the fields or to grow crops inside its barns. This is an absurd result, as anyone familiar with agriculture must realize, and it certainly cannot be what Congress intended. Courts may not so ignore a legislative judgment. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 18 (1981).

The Second Circuit has not only thwarted Congressional intent, but has also disrupted the long-standing understanding of federal and state environmental agencies and the agricultural community. If the Second Circuit has properly defined a CAFO, Southview Farm and virtually every other large farm in the country is now in violation of the CWA and has been for over twenty years. No one has thus far believed this to be the case. Neither EPA nor the Justice Department has yet demanded that large farms have federal or state discharge permits. Indeed, Southview Farm did not have a state CWA discharge permit. This was not an oversight because no one thought that a farm like Southview was within the scope of CAFOs. In fact, the State of New York specifically informed the farm that it was not required to have such a permit. An informal survey of other states indicates that environmental agencies generally have not requested large farms to obtain CWA permits, large farms have not applied for such permits, and few, if any, large farms have been subject to enforcement actions for failure to have a permit. The Second Circuit found little law on point, not because the District Court erred, but because no one imagined that an ordinary large dairy farm would ever be considered a CAFO.

The Circuit Court did claim to find one case "squarely on point," but that was a 1984 landlord-tenant eviction case involving a facility that was an acknowledged "finishing farm" for pigs. The status of the facility as a feedlot was not in question; it was a feedlot because it

was a feedlot. *Higbee v. Starr*, 598 F. Supp. 323 (E.D. Ark. 1984), *aff'd without opinion*, 782 F.2d 1048 (8th Cir. 1985). That circular argument is not relevant to whether the Southview Farm should be considered a CAFO here.

In 1987, when concern arose that the regulation of stormwater discharges might be applied not only to industrial but also to agricultural situations, Congress again amended the law to clarify, in the words of the legislative report, that "Agricultural Stormwater Discharges are not defined as a point source." 133 Cong. Rec. H131 (daily ed. Jan. 7, 1987) (analysis of Rep. Howard) on 33 U.S.C. § 1362(14), *reprinted in* 1987 U.S.C.C.A.N. 5 at 41. Field runoff is thus specifically excluded from federal discharge requirements.

Nevertheless, the Circuit Court has attempted in this case to graft a judicial exception onto the exemption, by claiming the manure applications were "excessive", contending that "there can be no escape from liability for agricultural pollution simply because it occurs on rainy days." *Concerned Residents for Environment v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994). Yet, whether the Circuit Court agrees with the wisdom of the agricultural stormwater exemption or not, Congress has explicitly determined that agricultural runoff is not subject to CWA permitting requirements. 33 U.S.C. § 1362(14) (1988).

The Circuit Court also creatively sought to narrow the exemption to apply only when the runoff is completely unsoiled by any contact with contaminants. Again, such conditions exist neither in the statute nor in the real world. Significantly, all cases cited to support this notion are either non-agricultural or date from before the passage of the 1987 congressional clarification.

II. FARM EQUIPMENT AND SWALES ARE NOT POINT SOURCES UNDER THE CLEAN WATER ACT.

The Second Circuit also disregarded Congressional intent by concluding that agricultural equipment and swales not directly discharging to navigable waters are point sources under the CWA. That Circuit attempted to undermine the basis of the agricultural exclusion by converting nonpoint agricultural discharges into point sources. Not only did Congress not intend this result, EPA has never acted as if this were true.

The Second Circuit interpretation would perhaps triple the scope of the CWA permitting program. It does this by deciding that swales and farm equipment such as manure spreaders are themselves point sources. Congress never authorized such a massive expansion of the federal water program, nor would it have done so without extensive debate and discussion. In a program operating since the 1970's, EPA and the states have issued approximately 65,000 CWA discharge permits, comprising perhaps 18,000 permits to municipal dischargers and 47,000 permits to industrial dischargers. There are approximately 370,000 large farms producing 76% of the food and fiber grown in the U.S. Under the Circuit Court's opinion, many of these farms would require a CWA discharge permit.

Under the Second Circuit opinion, even manure spreaders are point sources under the CWA. There are approximately 200,000 manure spreaders in the U.S., according to the best estimates of available data from the manufacturing trade association. Equipment Manufacturers Institute data reports. Yet, in more than twenty years of issuing CWA permits, EPA has never to our knowledge deemed it necessary to issue a single one to a manure spreader. Furthermore, under the Court's reasoning, agricultural equipment point sources cannot be limited to manure spreaders. Consequently, if a manure

spreader is a point source, presumably pesticide and fertilizer application equipment could also be point sources. We note that, based on annual sales figures and a ten-year life, there are approximately 105,000 pieces of pesticide equipment in the U.S. If only a small percentage of these pieces of farm equipment is subject to the requirements of the CWA, then the present permit program will be enormously expanded.

To add to the problem, the Circuit Court also invented a completely new category of point sources—swales. Swales are neither defined nor mentioned in the statute or the regulations. According to one state's conservation service, swales are depressions of unspecified size in the land that are at least seasonally wet, usually vegetated, and normally without flowing water. Personal communication, Virginia Department of Conservation and Recreation. On the apparent theory that if the water that occasionally pools in a swale does not happen to evaporate or seep into the ground, it might overflow into some ditch that might lead to some creek and then into navigable waters, the Circuit Court has discovered a new point source.

It is not clear how a permit could set specific discharge limits on such sources, how they would be monitored, or how they would be controlled. That is the very reason agriculture is considered a special case under the CWA and why nonpoint sources have always been regulated differently from point sources under the law. By that definition, there may be dozens, perhaps hundreds, of swales on any large farm. Without any guidance on the subject at all, it is difficult to imagine how EPA intends farmers to identify every swale on their land. Never before have swales been considered a point source.

The search for new point sources could be never-ending. In 1993, the Second Circuit decided that the human hand was not a point source, but it did so over the

dissent of the judge who wrote the opinion in the Circuit Court's present Southview Farm case. *U.S. v. Plaza Health Labs, Inc.*, 3 F.3d 643 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 2764 (1994).

Legally, this strained attempt to discover new point sources is irrelevant. In 1987, Congress resolved a similar controversy by enacting the agricultural stormwater exemption. Runoff from farms is excluded from other provisions of the CWA, not merely because it is not a point source but, even if so, because it is specifically exempted.

Once before, in 1977, the Court of Appeals for the D.C. Circuit sought to expand the scope of the CWA by denying the agricultural exemption to irrigation return flows. *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The court contended that Congress mandated that the permit system be as inclusive as possible, even if that meant trimming back the agricultural exemption. Congress thought otherwise. It recognized the absurdity of requiring hundreds of thousands of permit applications for irrigation return flows, and within months clarified the CWA explicitly to exempt them. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1577 (codified as amended at 33 U.S.C. § 1362(14)). That congressional response should have been unnecessary, for the law was already very clear. It is no less clear in this case.

Congress certainly did not intend the CWA permit program, enacted with great fanfare after long debate in 1972 and in subsequent amendments, to be expanded so enormously without some mention or discussion. Nevertheless, the Second Circuit has intruded in an area where Congress has expressly forbidden. As petitioners for certiorari note, this is the kind of "judicial legislation under the guise of construction" that our system does not permit. *Blockburger v. U.S.*, 284 U.S. 299, 305 (1932).

CONCLUSION

For the reasons set forth above, EMI prays that a writ of certiorari be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

SOUTHVIEW FARM and RICHARD H. POPP,

Petitioners,

vs.

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Second Circuit justified in upholding the unanimous jury verdict which found that the petitioners violated the Clean Water Act?

2. Was the Second Circuit's characterization of the petitioners' cattle barn complex as a large concentrated animal feeding operation consistent with the applicable statutory and regulatory definitions?

3. Are point source discharges of agricultural pollutants exempted from the Clean Water Act merely because they occur on rainy days?

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This brief is respectfully submitted on behalf of the respondents, Concerned Area Residents for the Environment ("CARE"),[1] in opposition to the petition for writ of certiorari seeking review of the Second Circuit's opinion.

OPINIONS BELOW

This case was brought in the United States District Court for the Western District of New York pursuant to the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 ("CWA"). A motion for summary judgment brought on behalf of the petitioners, Southview Farm ("Southview") and Richard H. Popp ("Popp") was denied in April of 1993. *Concerned Area Residents for the Env't v. Southview Farm,* 834 F. Supp. 1410 (W.D.N.Y. 1993). Following a unanimous jury verdict in Respondents' favor on five CWA violations and the state law trespass claim, the district court granted judgment as a matter of law on the five CWA violations but left intact the verdict on the trespass cause of action. (Pet. App. at 23a.) On September 2, 1994, the Second Circuit Court of Appeals, upholding the jury's verdict, unanimously reversed the district court.

STATUTE INVOLVED

The statutory provision at issue in this case is 33 U.S.C. § 1362(14).

STATEMENT OF THE CASE

A. Procedural History

On May 9, 1990, the respondents gave notice of their

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1. The full listing of individual respondents is included in the "parties" section of the petition for certiorari.

intention to sue pursuant to the CWA citizen's suit provision, 33 U.S.C. § 1365. The original complaint was filed on January 22, 1991. The complaint set forth a single cause of action under the CWA and included several state law claims. Before an answer was interposed, Petitioners moved to dismiss for failure to state a cause of action. Prior to a ruling on the motion, an amended complaint was served. The amended complaint became the operative pleading in the lawsuit.

On August 29, 1991, the district court denied Petitioners' motion to dismiss in its entirety. Rejecting the petitioners' argument that the respondents had not alleged a discharge from a point source, the court noted:

> After reviewing the complaint and the relevant case law, I find that plaintiffs have sufficiently alleged a point source discharge to withstand a motion to dismiss. The courts have not interpreted "point source" as narrowly as defendants suggest; indeed, several courts have stressed that the term should be construed broadly.

CARE v. Southview Farm, No. CIV-91-6031L, slip op. at 4 (W.D.N.Y. filed August 29, 1991).

Petitioners moved for summary judgment upon completion of discovery, arguing that no point source discharges could be established to substantiate the CWA claims. Petitioners also argued that several of the discharges identified in the amended complaint were exempt agricultural stormwater discharges. *See generally*, 33 U.S.C. § 1362(14).

On April 7, 1993, the district court denied Petitioners' motion for summary judgment. 834 F. Supp. 1410. Again

endorsing a broad "point source" interpretation, the court ruled as follows:

> In the case at bar, plaintiffs have presented photographs and both lay and expert testimony tending to show that Southview Farm contains both natural and manmade streams and ditches which, if plaintiffs' allegations are true, can and have conveyed pollutants from defendants' manure spreading activity into navigable waters.

834 F. Supp. at 1419. The court rejected the petitioners' argument that certain of the alleged discharges could be considered agricultural stormwater discharges as a matter of law. The court noted:

> Defendants rely in part on their assertion that the pollutants, if any, migrate because of rainwater run-off. However, the fact that some of the alleged discharges may have resulted from rainwater run-off does not necessarily mean that the discharge did not originate from a point source. Notwithstanding that it may result from such natural phenomenon as rainfall and gravity, the surface run-off of contaminated waters, once channeled or collected, constitutes discharge by point source.

834 F. Supp. at 1418.

A supplemental complaint was thereafter served identifying additional point source discharges which had occurred since the filing of the amended complaint. The case was tried before an

eight-person jury from April 26, 1993 to May 17, 1993. Following the district court's charge to the jury, the written instructions were furnished to the jury to consult during deliberations.

The jury deliberated for nearly two days and returned a unanimous verdict in favor of the respondents on five of the eleven Clean Water Act claims submitted for consideration. The jury found in favor of the petitioners on Respondents' nuisance and negligence claims. but returned a verdict in favor of the respondents on the trespass claim, awarding a total of $4,101 in damages. The jury determined that the CWA had been violated by the petitioners on July 12, 1989, July 13, 1989, August 22, 1989, September 26, 1990 and April 15, 1991. The 1989 discharges all occurred at one location within Southview, namely, the Wyant Farm, Field 104 while the 1990 and 1991 discharges occurred on two adjacent fields near the property of one of Southview's neighbors.

The petitioners next moved for judgment as a matter of law. On October 19, 1993, a decision, order and judgment was issued by the district court, setting aside the jury's verdict on the Clean Water Act violations and sustaining the verdict with respect to the trespass claim. (Pet. App. at 23a-57a.) With respect to the CWA violations of July 12, 1989 and August 22, 1989, the district court concluded that insufficient evidence was presented to support the jury's verdict. Regarding the violations of September 26, 1990 and April 15, 1990, the district court found, as a matter of law, that the discharges qualified as agricultural stormwater discharges and, therefore, were exempt from the CWA. The district court held that the discharge occurring on July 13, 1989 was not from a point source as contemplated by the CWA.

Respondents appealed the judgment as a matter of law to the United States Court of Appeals for the Second Circuit. On September 2, 1994, the Second Circuit unanimously reversed the

district court and upheld the jury's verdict on the CWA violations (Pet. App. at 1a.)

With respect to the 1989 violations from Field 104, the Second Circuit rejected the district court's opinion that the liquid manure exiting the field on those days reached navigable waters "in too diffuse a manner to create a point source discharge." (Pet. App. at 8a.) Instead, the Second Circuit concluded that the jury had a reasonable basis to conclude that the improved swale at the edge of Field 104, coupled with the drainage pipe under the stonewall leading into the ditch that leads into the Genesee River tributary was "in and of itself a point source." (Pet. App. at 9a.) Alternatively, the Second Circuit accepted the respondents' argument that the manure spreading vehicles themselves were point sources, and rejected the district court's opinion that "the connection between defendants' activity and the alleged discharge was too far removed to consider the tractors or spreaders as point sources." (Pet. App. at 47a.) The Second Circuit also overturned the district court's holding that the proof of the July 12, 1989 and August 22, 1989 discharges was too circumstantial to support the jury's verdict. (Pet. App. at 12a-13a.)

With respect to the September 26, 1990 and April 15, 1991 violations, the Second Circuit disagreed with the district court's conclusion that the discharges were exempt from the CWA because they constituted agricultural stormwater discharges. According to the Second Circuit, "the real issue is not whether the discharges occurred during rainfall or were mixed with rainwater run-off, but rather, whether the discharges were the result of precipitation." (Pet. App. at 14a.) The Second Circuit concluded that the jury was entitled to find that the discharges on those two dates were caused by over-saturation of the fields with liquid manure rather than the rain, and also that sufficient quantities of liquid manure were present so that the discharges would not qualify as "stormwater." (Pet. App. at 14a-15a.)

The Second Circuit also determined as a matter of law that Southview constitutes a concentrated animal feeding operation ("CAFO") which is, by definition, a point source under the Clean Water Act. 33 U.S.C. § 1362(14). *See also,* 40 C.F.R. § 122.23 (1994). Reviewing the uncontroverted evidence presented at trial relative to the size of Southview's dairy herd and the manner in which the herd is confined, the Second Circuit concluded that Southview is a large CAFO and, as a result, each discharge of manure into the navigable waters of the United States constituted a point source discharge in violation of the CWA. For this additional reason, the Second Circuit sustained the jury's verdict. The district court had denied Respondents' request to charge the jury that Southview was a CAFO.

B. Factual Background

Petitioner Southview Farm is one of the largest dairy farms in the State of New York. The farm employs 28 full-time and nine part-time employees. As of August, 1992, Southview owned 1,100 acres of land and had a cattle population of 1,290 milking cows with over 900 head of young cattle, for a total of 2,200 dairy animals.

Southview's cows are not pastured; they remain in the barns and are moved only for milking three times per day. The milking parlor is washed down and the milking machines are flushed after every milking with a chlorine cleanser and rinsed with a phosphoric acid solution. The resulting washwater is then pumped into a 2,000-gallon storage tank. The solution in the tank is subsequently used to wash the milkhouse floor. In the last step, the waste wash solution flows down an incline into one of five manure storage lagoons located on the farm.

The largest of Southview's manure storage lagoons covers four acres and has a capacity of approximately six to eight million

gallons of liquid cow manure and process wastes. In conjunction with the large lagoon, Southview installed a separator which pumps the cow manure over a mechanical device that drains off the liquid and passes the solids out through a compressing process. The solids that remain are dropped into bins for transport while the liquid is transported by gravity to the large manure storage lagoon.

Southview uses various technologies to apply the liquid cow manure (which includes the farm's chemical process waste) to its fields. One of the devices is a center pivot irrigation system. The center pivot irrigator is connected by a series of pipes to the liquid manure storage lagoon and is self-propelled. Southview also uses a "hard hose traveler," essentially, a long piece of plastic tubing on a large reel. The tubing is unwound from the reel and has a gun on the end which can propel liquid manure 150 feet into any direction, making a 300-foot wide swath for purposes of depositing the wastes on the fields.

Since 1988, Southview has had in place a piping system. The system pipes liquid manure from the storage lagoon to various locations across the Southview property without the use of vehicles. Southview's piping system extends underneath both state and town highways to nearby properties owned by the petitioners.

In addition to the above, Southview also uses manure spreading equipment, including spreaders pulled by tractors and other self-propelled vehicles. The vehicles are generally used to spread manure from the smaller lagoons which did not receive liquid manure from the separation system. In all, Southview's manure spreading records reflect the application of millions of gallons of manure to its fields.

REASONS FOR DENYING THE WRIT

The petitioners have failed to satisfy criteria traditionally applied by the Court in determining whether to grant a writ of certiorari. The Second Circuit, in a manner consistent with other circuit courts, correctly interpreted and applied the applicable provisions of the Clean Water Act and the corresponding regulations. In an attempt to obtain review here, the petitioners have mischaracterized the holding of the court below and, with little or no foundation, have exaggerated the impact the decision will have on agricultural enterprises.

I.

THE SECOND CIRCUIT WAS JUSTIFIED IN UPHOLDING THE UNANIMOUS JURY VERDICT WHICH FOUND THAT THE PETITIONERS VIOLATED THE CLEAN WATER ACT.

The central question in this case is whether each of the discharges of liquid manure into the navigable waters of the United States — established to the jury's satisfaction — came from a "point source." "Point source" is defined in the CWA as:

> Any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, rolling stock, concentrated animal feeding operation, vessel or other floating craft, or landfill leachate collection system from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). This definition was incorporated in the jury instructions read at the conclusion of the case and furnished to the jurors to consult during their deliberations. Petitioners' zeal to portray the Second Circuit's decision as renegade judicial lawmaking has led them to repeatedly sidestep the fact that the Second Circuit simply upheld the unanimous verdict of an eight-person jury. If consideration of Southview's petition starts, as it should, with the premise that the jury, after weighing the evidence, concluded that the discharges in question were from point sources, then the petitioners' argument loses its vitality.[2] So long as proper deference is paid to the jury's verdict, the petitioners' argument that the Second Circuit ignored the pertinent law lacks merit.

The flaw in the petitioners' analysis is that they proceed on the assumption that agricultural discharges and point source discharges are mutually exclusive terms. They are not. While it may be true that most agricultural discharges are nonpoint source in nature, there is nothing in the Clean Water Act nor any of the regulations promulgated thereunder which supports the general proposition that all agricultural discharges are nonpoint source in nature. Petitioners have cited no authority for such a proposition. Furthermore, a careful reading of the Clean Water Act militates against such an interpretation. While Congress intended to exempt nonpoint pollution, there is no general exemption for agricultural activities in the Clean Water Act. Thus, "EPA has been held to be precluded from exempting from the act . . . agricultural and silvicultural activities." *Sierra Club v. Alston Constr. Co., Inc.*, 620 F.2d 41, 44 (5th Cir. 1980), *citing Natural*

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2. Petitioners appear to have overlooked this point when they complain that the Second Circuit, in reinstating the jury verdict, "impermissibly substituted its own unsubstantiated factfinding for the findings of the district court . . ." (Pet. at n.7.) Of course, it was the district court which impermissibly substituted its judgment for that of the jury. *See Smith v. Lighting Bolt Prods., Inc.*, 861 F.2d 363, 367 (2nd Cir. 1988).

Resource Defense Council ("NRDC") v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

In *NRDC v. Costle,* the D.C. Circuit set aside EPA's attempt to grant an across-the-board exemption for all "discharges of pollutants from agricultural and silvicultural activities ... including run-off from cultivated crops, [and] pastures" from the requirement for NPDES permits. 568 F.2d at 1372 n.5. The courts have been unable to discern any intention on the part of Congress to provide a blanket exemption for agricultural activities. Furthermore, there is nothing in the 1987 Clean Water Act amendments which suggests that Congress sought, at that time, to provide such a blanket amendment. As noted below, the only effect of the 1987 amendment was to add a specific exemption for "agricultural stormwater discharges" to the exemption which was added earlier for "return flows for irrigated agriculture." 33 U.S.C. § 1362(14), *as amended by* Pub. L. No. 100-4, tit. V, § 502(a.) The fact that Congress has elected on those two separate occasions to incorporate specific agricultural exemptions in the CWA definition of the term "point source," suggests that agricultural discharges which come under the general definition but do not qualify for either exemption constitute point source discharges within the reach of the CWA.

In the absence of any express exemption for agricultural discharges, the jury was entitled to evaluate whether or not the discharges at issue constituted point source discharges as defined in the CWA. In upholding the jury's conclusion that these discharges were from a point source, the Second Circuit recognized that the definition of a point source is to be broadly interpreted. *Dague v. City of Burlington,* 935 F.2d 1343, 1354 (2d Cir. 1991), *rev'd on other grounds,* 505 U.S. ___, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992); *see also, Sierra Club v. Abston Constr. Co.,* 620 F.2d 41, 45-46; *United States v. Earth Science, Inc.,* 599 F.2d 368, 378 (10th Cir. 1979) ("The concept of a point source

was designed to further this [regulatory] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.")

In light of the uniformly broad interpretation given the definition of point source in the CWA, the Second Circuit did no violence to the statutory scheme when it concluded that the drainage ditch at the edge of Field 104 constituted a point source. The petitioners' description of the swale at the edge of Field 104 as a mere "depression" is misleading since it ignores the fact that the drainage at this location had been improved with the placement of a drainage tile pipe emptying into a drainage ditch which, itself, empties into a tributary of the Genesee River. Since the term "ditch" is included in the CWA definition of point source, the petitioners should not be heard to claim that such a conveyance was not within the contemplation of Congress.

The petitioners would have the Court limit point source discharges to classic "end-of-the-pipe" discharges. The cases demonstrate, however, that the term "point source" has been given much broader sweep. For example, in *Dague v. City of Burlington,* 935 F.2d 1343, the emission of pollutants leaching from a landfill into a railroad culvert was properly considered a "point source." In *Fishel v. Westinghouse Elec. Corp.,* 640 F. Supp. 442 (N.D. Pa. 1986), overflow from a lagoon through an unchannelized area into a stream was considered a point source. Furthermore, in *United States v. Oxford Royal Mushroom Prods.,* 487 F. Supp. 852 (E.D. Pa. 1980), the court found that an indictment, which alleged that a spray irrigation system was a point source, was legally sufficient:

> Oxford has a spray irrigation system, designed to spray wastewater onto fields in quantities small enough to be absorbed by

> those fields; none of the discharge should run-off into the surface water. The discharges forming the basis of the indictment resulted from spraying an overabundance of wastewater onto the surface of the irrigation fields, which in turn ran-off into a nearby stream through a break in the berm around those fields.

487 F. Supp. at 844. Similarly, there is no requirement that the point source discharge directly into navigable waters in order to violate the CWA. In *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976), discharges to the city sewers which eventually emptied into the Mississippi River were considered a point source. In *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642 (E.D. Pa. 1980), a landfill which discharged through such methods as "gullies, trenches and ditches" was found to be a "point source," even though it was not directly connected to the waters of the United States. Likewise, in *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623 (D.R.I. 1991), the point source included the defendants' septic system, which leached through a pipe installed by the municipality.

Finally, there is no requirement that the conveyance which qualifies as the point source be man-made. In *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, the Fifth Circuit held: "nothing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." 620 F.2d at 45. There is nothing in the Clean Water Act definition of point source that exempts natural conveyances.

The Second Circuit was also acting in harmony with existing precedent when it decided that the manure spreading vehicles

themselves constitute point sources. Section 1362(14) defines a "point source" to include a "container" or "rolling stock" and the cases have routinely found vehicles to be within the definition of point source. 33 U.S.C. § 1362(14). *See, e.g., United States v. Tull*, 615 F. Supp. 610, 622 (D.C. Va. 1983), *aff'd*, 769 F.2d 182, *rev'd on other grounds*, 481 U.S. 412, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987); *United States v. Weisman*, 489 F. Supp. 1331, 1337 (N.D. Fla. 1980); *Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. 525, 532 (W.D. La. 1979), *aff'd in relevant part*, 715 F.2d 897 (5th Cir. 1983); *United States v. Holland*, 373 F. Supp. 665, 668 (N.D. Fla. 1974). As noted above, the fact that the manure spreading vehicles did not discharge directly into navigable waters is irrelevant.[3] Accordingly, the Second Circuit's decision to uphold the jury verdict is entirely consistent with existing precedent and does not frustrate the congressional intent behind the Clean Water Act. Agricultural point source discharges can and do occur, and are increasing as farms like Southview grow in size and intensity. (*See* Point IV, *infra.*)[4]

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3. The petitioners, like the district court, appear to concede that the manure spreading vehicles *could be* point sources so long as the connection between the manure application and the discharge into the navigable waters was sufficiently direct. Once again, since indirect point source discharges violate the CWA, the temporal element cannot be the dispositive factor. In any event, this point, at best, raises a fact question which the jury resolved against Southview.

4. Not surprisingly, the petitioners make no mention of the incident which occurred during July of 1992 when one of Southview's liquid manure pipelines ruptured and discharged thousands of gallons of manure into nearby ponds, wetlands and a stream which eventually led to the Genesee River in Letchworth State Park. Extensive fish kills from nearby ponds were reported and discolored water and mounds of manure-laden foam were visible for weeks from various scenic overlooks in the state park. Contrary to the description contained in the petition (Pet. at 12), Southview is far from a conventional farm.

II.

SOUTHVIEW FARM CONSTITUTES A CONCENTRATED ANIMAL FEEDING OPERATION.

Although Southview's general position that most agricultural pollution is nonpoint source in origin is accepted, there is no avoiding the reciprocal truth: some agricultural pollution is from point sources. CAFOs are one such point source, a source deemed so important by Congress that they were enumerated as a point source class within the CWA. 33 U.S.C. § 1362(14) ("point source" includes "any discernible, confined and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation"). When the CAFO definition is evaluated, it is apparent that Southview is indeed within the class.

Animal feeding operation ("AFO") is defined by regulation as "a lot or facility" where animals "have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period," and "[c]rops, vegetative forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23(b)(1) (1993). A dairy farm AFO becomes a regulated large CAFO when it houses more than 700 mature dairy cattle. *Id.*, app. B (a)(1) (1993). There is a zero-discharge standard for large CAFOs. 40 C.F.R. § 122.23, app. B (a)(1); 58 Fed. Reg. 7632 (1993).

Southview's strained argument that it is not a CAFO because it has adjacent lands[5] which bear vegetation during portions of the

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5. The reference in Southview's petition to *Farmegg Prods., Inc. v. Humboldt County,* 190 N.W. 2d 454 (Iowa 1971), defining appropriate characteristics of "industrial" agricultural operations begs the question before the Court. Congress and the EPA have defined "industrial" agricultural (Cont'd)

growing year is nonsensical.[6] If the petitioners' argument to this Court is accepted, the presence of *any* vegetated areas adjacent to a large CAFO would lift it from the regulated industrial cattle arena. Clearly, Congress' intent was not to exclude concentrated animal feeding operations from regulation simply because they exist in a rural setting and the operators happen to own and use vegetated, adjacent lands. The presence and use of adjacent fields have not prevented other federal circuits from finding a facility to be a CAFO. *See Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055 (5th Cir. 1991) (Facility was CAFO despite use of waste manure on adjacent crop fields for irrigation and fertilization; and as noted in an earlier opinion in the same case: "the fields produce alfalfa, rye and other grains for cattle feed." 924 F.2d 558, 559); *Higbee v. Starr,* 598 F. Supp. 323 (E.D. Ark. 1984), *aff'd without op.*, 782 F.2d 1048 (8th Cir. 1985) (hog houses were a CAFO although collected wastes were spread on adjacent fields). The Second

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(Cont'd)
operations as CAFOs. Simply because Southview views its high-tech waste-handling operations and its 2,000-head herd of cattle in a pastoral light does not mean that it should be exempt from the CAFO classification drafted by Congress, defined by the EPA, and accepted by Congress for nearly 20 years. In fact, Petitioner distorts the true state of affairs by claiming that "few dairy farms today rely on pasturage to feed their mature lifestock." (Pet. at 22.) According to the 1987 Census of Agriculture, only 780 dairy farms nationally qualify as large CAFOs.

6. Note that confined in pasture operations (CIPOs) are distinguished from CAFOs by the EPA. The definition of CAFOs explicitly excludes operations which confine animals in an outdoor, vegetated environment, and distinguishes large CIPOs from large CAFOs, since CAFOs undoubtedly have more severe waste management difficulties. *See generally,* 58 Fed. Reg. 7616 (1993) (exempting CIPOs from CAFO permitting requirements). Petitioners distort the holding of the Second Circuit by claiming it requires a dairy farm to grow crops inside its barns to avoid being classified as a CAFO. (Pet. at 13.) On the contrary, if a dairy farm pastures its cows as farmers have done through the ages, it will not qualify as a CAFO.

Circuit's ruling on the CAFO issue is supported by statutory and regulatory construction and was advanced by the EPA in its *amicus* brief.

The fact that Southview grows crops on adjacent fields is of no legal significance, since the animals were not pastured on those fields. Any other interpretation of the regulation would be contrary to the intent of Congress and the EPA since most CAFOs do grow some crops. "EPA presumes that most, if not all, feedlots have some vegetation nearby." U.S. Envtl. Prot. Agency, *Perceptions About EPA's Actions in the Southview Farm Case* 1 (Dec. 12, 1994).

The regulatory history of the "vegetation criterion" is telling. When originally proposed, the AFO definition encompassed a "a lot or facility" in which "crops, vegetation or forage growth are not sustained in the area of confinement." 40 C.F.R. § 125.51(a)(1) (proposed), 40 Fed. Reg. 54185 (1975). However, in responding to subsequent comments questioning whether growth of vegetation in only part of the confined area disqualified a facility from being an AFO, the regulation was changed to make a "clarification" stating "that only confined areas which lack vegetation, crops, etc. in every part or portion of the lot or facility are included." 41 Fed. Reg. 11458 (1976).

While the new version did substitute "lot or facility" for "confined area" in the vegetation criterion, that was due to the fact that EPA used the term "confined area" interchangeably with "lot or facility." The agency never indicated any intent to change the locus of inquiry from the confined area to all of the feedlot owner's property. Thus, the phrase "lot or facility," found in both 40 C.F.R. §§ 122.23(b)(1) and 122.23(b)(1)(ii) (1993), refers to the same location — the area where the animals are "confined," 40 C.F.R. § 122.23(b)(1)(i), and not some larger area.

The presence of adjacent fields does nothing to mitigate the monumental animal waste production going on within the confined animal area itself. As the Second Circuit noted, there is a two-fold rationale for the exemption in the CAFO definition for vegetated confinement facilities: (1) the fact that vegetation can be sustained in the area in which the animals are confined suggests a lower density of animals; and (2) the vegetation helps to absorb and reduce the amount of pollution. (Pet. App. at 19a.) CAFO permitting requirements reflect this reality. 58 Fed. Reg. 7631 (dealing with wastewater removal and land application relative to CAFOs).

Land disposal of waste like that engaged in by Southview has been addressed by the EPA. The EPA established a general CAFO permit for its Region 6 (Louisiana, New Mexico, Oklahoma and Texas). Under this general CAFO permit, waste handling, treatment, and management must not create environmental or public health hazard of any kind. Specifically, the wastes must be disposed of in a manner such as to prevent them from being discharged to waters of the United States. 58 Fed. Reg. 7627, 7629. Discharge of waste from the application site is prohibited.[7] 58 Fed. Reg. 7632. Thus, EPA has already addressed operations like Southview's without crippling agriculture, as Petitioners have warned.

Once it has been established that a dairy operation constitutes a large CAFO, the only issue which remains is whether there has been a discharge into navigable waters. Since even the petitioners cannot dispute that there were discharges into navigable waters on the five dates in question, the CAFO requirements have been satisfied.

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7. Note that, under this permit, large CAFOs may apply animal wastes to fields in amounts exceeding nutrient uptakes only if the sites are isolated from surface waters and no potential exists for run-off to reach a water of the United States. 58 Fed. Reg. 7632. There was no judicial challenge to EPA's Region 6 permit.

III.

A DISCHARGE IS NO LESS A POINT SOURCE DISCHARGE BECAUSE IT OCCURS ON A RAINY DAY.

Petitioners' basic proposition with regard to the "agricultural stormwater discharge" exception is that as long as it rains, an agricultural enterprise can pollute the nation's waters at will. In contrast, the Second Circuit reasoned that "the real issue is not whether the discharges occurred during rainfall or were mixed with rainwater run-off, but rather, whether the discharges were the result of precipitation." (Pet. App. at 14a.) Thus, "while the statute does include an exception for 'agricultural stormwater discharged,' there can be no escape from liability for agricultural pollution simply because it occurs on rainy days." (Pet. App. at 13a.)

The Second Circuit's holding is consistent with the district court's charge to the jury. The charge stated that the exemption pertains to discharges caused "primarily" by "ordinary, natural" runoff of precipitation:

> Point source does not include agricultural storm water discharges. Storm water means storm water run-off or snow melt run-off or surface water run-off and draining. The ordinary, natural run-off of rain water, that is the flow of excess precipitation, is not a point source. . . . Disparate, random, naturally induced run-off of pollutants, whatever kind, caused *primarily* by rainfall or other natural precipitation around activities that employ or cause pollutants is not a point source discharge . . .

(Tr., vol. v, at 2118-2119.) Thus, Petitioners' attack not only second-guesses the jury's evaluation of the credibility of the evidence presented, but also challenges both lower courts' interpretation of the applicable law.[8]

The Second Circuit's interpretation is consistent with the relevant legislative and regulatory history. The exemption was added by the Water Quality Act of 1987, Pub. L. No. 100-4, § 503, at the same time that "Congress mandated comprehensive regulation of certain forms of industrial and municipal stormwater run-off under Clean Water Act § 402(p), 33 U.S.C. § 1342(p). (Pet. App. at 13a.) Given the enactment of the new stormwater permit program, however, Congress (especially members from agricultural states) wanted to avoid any possibility of bringing run-off caused by stormwater from farms under the new program. Therefore, as the Second Circuit noted: "one can infer that Congress wanted to make it clear that agriculture was not included in this new program." (Pet. App. at 13a.)

It is evident that Congress intended to preserve the status quo, which had existed during the fifteen years between enactment of the Clean Water Act in 1972 and enactment of the exception, pursuant to which "agricultural stormwater runoff was always considered nonpoint pollution exempt from the Act." (Pet. App. at 13a.) *See, e.g.*, 40 C.F.R. § 125.4(h) (1973) (exception for run-off from cultivated crops).

Early on, EPA recognized that the test for determining if a

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8. When setting aide the jury verdict, Judge Larimer found it necessary to rule that the manure "would have remained on [petitioners'] land had it not been for a heavy rain." (Pet. App. at 352.). Thus, he adhered to his prior ruling that the primary *cause* of the discharge was the relevant area of inquiry. The problem was that he substituted his own findings of fact for the reasonable findings of the jury.

stormwater discharge occurred is whether the discharge was "caused or initiated solely by natural processes such as precipitation," so that "[t]he intent of the regulations is to exclude from the NPDES permit program all natural runoff from agricultural land which results from precipitation events." 41 Fed. Reg. 7963, 7964 (1976).

Although EPA regulations do not define "agricultural stormwater discharge," regulations promulgated on November 16, 1990 to implement the 1987 industrial/municipal stormwater regulatory program defined the general term "storm water" as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b) (13) (1994). No reported judicial decision could be found interpreting the meaning of "agricultural stormwater," yet the New York State Department of Environmental Conservation has ruled that in order for the identical exception under New York Environmental Conservation Law section 17-0105(6) to apply, "the waste water being discharged must result from precipitation which runs off the crop field." *In re N. Adirondack Farms, Inc.*, DEC Decl. Rul. 17-07 at 6 (1992).

Thus, for the discharges in question, the issue was not whether they occurred during rainfall, or whether the discharge was mixed with rainwater run-off,[9] but whether the discharge was

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9. Petitioners make much of the Second Circuit's statement, with regard to the September 26, 1990 discharge, that the jury could have properly found that "sufficient quantities of manure were present so that the run-off could not be classified as 'stormwater.' " (Pet. App. at 15a.) The reference to "sufficient quantities" is taken out of context, and was merely an acceptance of Respondents' alternative argument that *even if* the discharge was caused by precipitation, it would not qualify for the exemption if it is so polluted that it cannot be considered "stormwater." *See, e.g., RAIL v. Diversified Systems*, 804 F. Supp. 1036, 1039 (E.D. Tenn. 1992) (run-off contaminated by leachate was not stormwater); *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), (Cont'd)

the *result* of precipitation. Otherwise, farmers would be free to dispose of excess waste in conjunction with meteorological forecasts of precipitation, and the months of March and April would be open season for discharges due to snow melt run-off. Petitioners' position would lead to the absurd result that a farmer could dispose of his waste by mixing it with a few drops of rainwater. While there is a line to be drawn somewhere, it was up to the jury and not the trial judge to draw it. As the Second Circuit recognized, "all discharges eventually mix the precipitation run-off in ditches or streams or the navigable water so the fact that the discharge might have mixed with runoff cannot be determinative." (Pet. App. at 14a.)

Accordingly, since the jury had a reasonable basis to find that the discharges on September 26, 1990 and April 15, 1991 "were not the result of rain, but simply occurred on days when it rained," the Second Circuit properly upheld their verdict. (Pet. App. at 14a.)

(Cont'd)

rev'd on other grounds, 505 U.S. ___, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992) (leachate generated by percolation of precipitation required NPDES permit). Nonetheless, the Second Circuit also accepted the respondents' main contentions that "the jury could properly find that the run-off was primarily caused by the over-saturation of fields," and "could have found a discharge unaffected by rain." (Pet. App. at 15a.) Therefore, the question of "sufficient quantities" is in no way a necessary component of the decision. Also note that, because the discharges included "process waste water" (including waste chemicals), 40 C.F.R. § 412.11-412.13 (1994), it was not stormwater.

IV.

THE DECISION OF THE SECOND CIRCUIT IS CONSISTENT WITH SOUND PUBLIC POLICY.

As noted above, the Second Circuit decision conforms to existing precedent and represents a reasoned application of current agricultural policy as expressed in the Clean Water Act and its accompanying regulations. It is inconsistent with sound public policy to place intensive, technologically-oriented dairy farms like Southview with their potential for massive discharges of manure beyond the purview of the Clean Water Act.

"American agriculture is changing rapidly — becoming more concentrated, more technically advanced and more integrated with the input and marketing sectors. "In other words, American agriculture is rapidly becoming industrialized." Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law,* 72 Neb. L. Rev. 210, 213 (1993). Accordingly, agriculture, like any other industry, should be required to internalize its fair share of the cost of cleaner water. George A. Gould, *Agriculture, Non-Point Source Pollution and Federal Law,* 23 U.S.C. at Davis L. Rev., 461, 488 (1990). It is both unrealistic and unfair for the petitioners to expect that the public should bear the costs of water quality impairment caused by their own improper manure management practices. Instead, it is appropriate to require that the petitioners and their counterparts in the agricultural community ameliorate the environmental impacts of their increasingly industrialized operations.

Recent studies indicate that agriculture is, far and away, the leading source of water quality impairment of this country's lakes and rivers. Office of Water, U.S. Envtl. Prot. Agency, *Nat'l Water Quality Inventory: 1992 Rep. to Congress* 9-13 (1994). Virtually every region of the country has experienced water quality

problems resulting from livestock waste. Larry C. Frarey and Staci J. Pratt, *Environmental Regulation of Livestock Production Operations,* Nat. Resources and Env't (A.B.A. Nat. Resources, Energy and Envtl. L. Sec.), Winter 1995, at 8. Even the agronomist used at trial as an expert witness on behalf of the petitioners has written that careless manure management practices pose serious environmental hazards:

> Excessive rates of manure will over-supply nutrients that may affect plant growth and animal nutrition. Excessive rates of application as well as accumulations of manure around barn lots will eventually cause water pollution. Preventing such problems calls for a combination of appropriate soil and water conservation practices and proper management of the rate, timing and method of manure application. In extreme cases, additional land must be used to lower the application rate.

Stuart D. Klausner, *Managing the Land Application and Animal Manures: Agronomic Considerations,* Dairy Manure Mgmt. (Ne. Regional Agric. Engineering Serv., Syracuse, N.Y.), Feb. 22-24, 1989 at 79, 86. The Second Circuit's decision is simply a reflection of a statutory and regulatory framework designed to address, in part, the serious and widespread environmental risks posed by large industrialized dairy farming and other livestock enterprises. In essence, Southview Farm is more like an industrial enterprise than an old-fashioned family farm. The Court, therefore, should view with a jaundiced eye Petitioners' attempts to invoke protections more properly aimed at traditional agriculture. *See,* Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law,* 72 Neb. L. Rev. at 215-216. *See, generally,* William P. Browne, *et al., Sacred*

Cows and Hot Potatoes: Agrarian Myths in Agricultural Policy (1992).

Ultimately, if the petitioners seek to overrule the Second Circuit's determination in this case, Congress is the proper forum. Currently, Congress is considering a CWA rewrite bill which, among other things, would modify the definition of point source in the CWA to exclude all land applications of manure. H.R. 961, 104th Congress, 1st Sess. (1995); *see,* 25 Env't Rep. (BNA) 2124 (March 3, 1995). If the prevailing policy, as embodied in the CWA, is to be revised, Petitioners should direct their efforts at Congress, not this Court.

CONCLUSION

For the reasons set forth above, the respondents respectfully request that the Court deny the petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1994

SOUTHVIEW FARM and RICHARD H. POPP,

Petitioners,

against

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* DAIRYLEA COOPERATIVE INC. AND NATIONAL MILK PRODUCERS FEDERATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether the burdens imposed upon dairy farmers, consumers, government and the courts by the decision of the Court of Appeals justify the granting of certiorari.

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BRIEF OF AMICI CURIAE

Dairylea Cooperative Inc. and National Milk Producers Federation in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Preliminary Statement

Dairylea Cooperative Inc. ("Dairylea") and the National Milk Producers Federation ("NMPF") submit this brief as amici curiae pursuant to Rule 37.2 of the Rules of this Court, in

support of Petitioners, Southview Farm and Richard H. Popp (the "petitioners").

Interest of Dairylea Cooperative Inc. and the National Milk Producers Federation as Amici Curiae

Dairylea Cooperative Inc. ("Dairylea") is a farmer-owned dairy cooperative of approximately 2,300 members, including petitioners, with dairy farms in New York, Pennsylvania, New Jersey, Maryland and most New England states. Dairylea markets approximately 3.5 billion pounds of milk annually and participates in a milk marketing network stretching from Maine to Maryland to Ohio.

The National Milk Producers Federation ("NMPF") has 34 cooperative members (such as Dairylea), 30 corporate associate members, and 15 individual associate members which produce milk in the 48 contiguous states. The aggregate member milk volume for 1994 was 81.7 billion pounds of milk.

Both Dairylea and NMPF are dedicated to the pursuit of public policy that promotes responsible, efficient, and environmentally sound dairy production and the distribution of healthful dairy products to the American consumer. The decision of the Second Circuit in Concerned Area Residents For The Environment v. Southview Farm, 34 F.3d 114 (2d Cir. 1994) (the "Decision") adversely impacts Dairylea's and NMPF's members as well as tens of thousands of dairy farmers across the country.

In enacting the Clean Water Act and its exemptions for farms, Congress recognized the nature and importance of farming by creating the "agricultural stormwater exemption"

which is the subject of this case. 33 U.S.C. § 1362(14). The Decision, which eviscerates this clear and important exemption, will improperly subject tens of thousands of dairy farmers to a myriad of regulation and costs, inspection mandates, fines, criminal penalties, incalculable litigation, and additional federal and state bureaucracy. The Decision is particularly disconcerting for two reasons. First, the Second Circuit determined that Southview Farm, including the crop and forage crop areas, should not be treated as a farm which is exempt from the Clean Water Act, but rather as a Concentrated Animal Feeding Operation ("CAFO") which is subject to the Act. This determination demonstrates a lack of understanding of dairy farming as an integrated operation which houses and feeds livestock, grows crops and silage using the natural by-product of manure as fertilizer, and produces milk.

Second, the Decision creates far reaching adverse implications for all farmers by determining that the mere application of liquid manure on agricultural crop land is not exempt from the definition of a "point source" and could be a violation of the Clean Water Act. This holding exposes thousands of farmers to potential regulation and litigation which was clearly not intended by Congress.

Summary of Argument

By its misconstruction of federal law and EPA regulations, the Court of Appeals has engaged in "judicial legislation" which will create an unacceptable burden on farmers, government, and the courts which was never intended by Congress.

ARGUMENT

POINT I

The Court of Appeals, by misconstruing both federal law and EPA regulations, has imposed a substantial burden upon dairy farmers and consumers.

As set forth in detail in the petition and the briefs of the other amici, the Second Circuit misconstrued the Clean Water Act and eliminated exemptions created to protect dairy farms. (Petition, pp. 15-18).[1]

As the petition illustrates, the Second Circuit took a dairy farm and essentially recharacterized it as a CAFO, and therefore a "point source" under the Clean Water Act. 33 U.S.C. § 1362 (14). The court focused on the dairy barn and held that because crops were not grown where the cattle were fed, the entire farm did not fall within the clear and necessary regulatory exemption from the definition of CAFO afforded such facilities under 40 C.F.R. § 122.23(b)(1). Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 123 (2d Cir. 1994). 40 C.F.R. § 122.23(b)(1). The implication of this determination is that crops apparently must be grown in a dairy barn, or cows must graze in the area where the crops grow in order for the exemption to apply. Id.

In contrast, the District Court, which was overruled, had reviewed the statute and regulatory framework and applied a

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[1] All references to "Petition" are to the Petition for Writ of Certiorari filed by Southview Farm and Richard H. Popp on February 1, 1995.

common sense approach: i.e., that a dairy farm on which crops are grown as an integral part of the dairy operation is not a CAFO and is exempt. Concerned Area Residents for the Environment v. Southview Farm, 834 F.Supp. 1422, 1432 (W.D.N.Y. 1993) rev'd 34 F.3d 114 (2d Cir. 1994).

More important, the Second Circuit determined that the natural run-off of manure from agricultural land constituted a discharge from a "point source" despite a precise exemption for agricultural stormwater run-off. 34 F.3d 114, 118-119. As a result, farmers formerly expressly exempted by Congress have now been judicially drawn into a statutory scheme which was never intended to apply to them.

The Decision has adverse implications for dairy farmers who have as few as 200 mature dairy cattle (40 C.F.R. § 122, app. B) because it subjects them to the Clean Water Act and significant additional cost. These costs will threaten the viability of family farms already subject to economic stress and inevitably lead to price increases to consumers of dairy products.

The EPA studied the economic impact on farmers of compliance with the Clean Water Act and estimated that in 1993, the minimum costs on the barn and farmyard area alone would have been between $20,000 and $65,000 for dairy herds of between 200 and 700 head. Commenters estimated that the original EPA 1974 cost estimates extrapolated to 1992 dollars, using a standard cost index, increased to approximately $98,000. 58 Fed. Reg. 7610, 7614-7615 (1993).

It is therefore clear that the issues presented by the petition are of paramount importance to farmers and consumers alike, and for this reason alone the petition should be granted.

POINT II

The decision will generate burdensome and costly litigation and administrative complications.

A court's role is to adjudicate, not legislate, and the Decision illustrates the weaknesses inherent in "judicial legislation." The Second Circuit held that it was within the province of the fact finder to make a determination whether run-off was qualified for the agricultural stormwater exemption: the court permitted a jury to determine that "sufficient quantities of manure were present so that the run-off could not be classified as 'stormwater.'" Concerned Area Residents For The Environment v. Southview Farm, 34 F.3d 114,121 (2d Cir. 1994). As the court did not define what constitutes a "sufficient quantity of manure," there is no way for a farmer to know whether the spreading of manure through an otherwise legal process is now rendered improper because the Decision provides no standards by which manure content of run-off may be measured. The absence of such standards makes the Decision wholly unworkable.

This fundamental flaw in the Decision was the product of a flawed process. As described in detail in the Petition, the Second Circuit adopted the position of the amicus brief of the United States Attorney General which was submitted only three working days before oral argument and to which there was no opportunity to respond. (Petition, p. 12, FN 3). In essence, the court, by adopting this amicus brief, has expanded

the reach of the Clean Water Act to regulate dairy farmers without the normal opportunities for public participation and other regulatory and legislative safeguards.

Finally, by limiting the agricultural stormwater exemption, the Decision exposes farmers to civil litigation and potential criminal penalties for violation of the Clean Water Act and applicable state and federal permitting requirements. It potentially permits disgruntled neighbors to bring farmers into federal court by conjuring up any conceivable application of the Clean Water Act to a farmer's manure disposal process. This is precisely the harm that Congress intended to avoid when it enacted the agricultural exemptions to the Clean Water Act.

For these reasons as well, the petition should be granted.

Conclusion

Dairylea and NMPF respectfully request that the petition for certiorari be granted.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF FARM CREDIT OF WESTERN NEW YORK, ACA, FIRST PIONEER FARM CREDIT, ACA, EMPIRE FARM CREDIT, ACA, YANKEE FARM CREDIT, ACA, FARM CREDIT OF MAINE, ACA, AND COBANK, ACB, IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHVIEW FARM and RICHARD H. POPP,

Petitioners,

v.

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF AMICUS CURIAE OF FARM CREDIT OF WESTERN NEW YORK, ACA, FIRST PIONEER FARM CREDIT, ACA, EMPIRE FARM CREDIT, ACA, YANKEE FARM CREDIT, ACA, FARM CREDIT OF MAINE, ACA, AND COBANK, ACB, IN SUPPORT OF PETITIONER

ISSUES PRESENTED

The Amici Curiae respectfully urge the Court to grant Petitioner's Petition for a Writ of Certiorari.

The issues raised by Petitioner's case have important consequences for the American dairy industry and agricultural lenders serving this industry, namely:

1. The Second Circuit decision is contrary to the generally accepted interpretation of the Clean Water Act in the dairy industry and among agricultural lenders.

2. If allowed to stand, the Second Circuit decision will have potentially serious adverse economic consequences for all dairy farms.

3. The potential for economic harm to the dairy industry may also have potentially adverse consequences for agricultural lenders and rural communities.

INTEREST OF AMICI CURIAE

Farm Credit of Western New York, ACA, First Pioneer Farm Credit, ACA, Empire Farm Credit, ACA, Yankee Farm Credit, ACA, Farm Credit of Maine, ACA, and CoBank, ACB, are all members of the Farm Credit System, a federally chartered, national network of cooperatively-owned organizations providing credit and financial services to American agriculture and its cooperatives. The Farm Credit System, operating under the Farm Credit Act of 1971, as amended[1] constitutes the largest single source of credit to American agriculture. As lenders to dairy farmers and their cooperatives, we are very concerned about what we see as the potentially large negative impact of the decision of the United States Court of Appeals for the Second Circuit in this case on the American dairy industry and the lenders serving this industry.

We believe that the continued vitality of American agriculture depends upon a clean environment, and upon the use of "best management practices," which include compliance with all applicable environmental laws and regulations. Therefore, we support the overall goals of the Clean Water Act ("**CWA**").

However, the Second Circuit decision in this case goes too far. This decision is a major, unwarranted departure from the generally accepted meaning of the CWA, which has a potentially serious adverse impact upon the American dairy industry.

We respectfully urge the Court to grant the Petition for a Writ of Certiorari, and to consider carefully the issues presented by Petitioner's case.

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[1] 12 USC 2001, *et seq.*

ISSUES

1. The Second Circuit decision is contrary to the generally accepted interpretation of the Clean Water Act in the dairy.

As evidenced by the authorities cited in the Petitioner's brief, Congress did not intend the requirements of a "Concentrated Animal Feeding Operation" ("**CAFO**") to apply to dairy farms, nor did it intend for the application of manure on agricultural land to be treated as a "point source" under the CWA. Both of these findings are inconsistent with the express language of the CWA, and constitute an excessive burden upon American dairy farmers well beyond what is actually needed to preserve clean water.

In treating a large dairy farm as a CAFO, the Second Circuit Court decision applies the environmental requirements for an industrial site to a dairy farm. While this standard may be appropriate for heavily concentrated animal feedlot operations, it is completely inappropriate for a dairy farm. Today, successful dairy farms are managed as a holistic unit with beneficial recycling; land is used to grow crops, these crops are fed to the animals, and the animal manure is recycled into the land as a soil nutrient. Inputs and outputs are carefully coordinated in cycles which balance each other to maintain a clean ecosystem while improving soil fertility. Requiring a dairy farm unit to meet CAFO requirements is an excessive and needless regulatory burden which will discourage farmers from expanding their farming operations and impose unnecessary costs and unwarranted time delays without any corresponding benefit to the environment.

The Second Circuit decision, characterizing the discharge from manure spreading equipment as a "point source" discharge, potentially affects virtually every dairy

farm and other livestock operation in America. The manure application program used by Petitioner's farm is comparable, for purposes of this discussion, to the system used by most dairy farmers throughout the United States. Treating each application of manure on farmland as a point source discharge will require virtually every dairy farmer, whether a small or large dairy operation, to drastically change his manure management program. For many small and medium-sized dairy farmers, this could have a significant impact on their continued economic viability.

As lenders to the dairy industry, we believe the Second Circuit's decision is contrary to an informed reading of the CWA, and to the generally held understanding of this law among dairy farmers, agricultural lenders and various state authorities. Further, dairy farmers have made business decisions, and lenders have lent money to dairy farmers, with the understanding that the CWA does not apply to dairy farms in the ways found in the Second Circuit Court's decision. The Second Circuit's decision changes the environmental ground rules in midstream for dairy farmers and their lenders, and may have an *ex post facto* negative effect on many of these business and lending decisions. If the lower court's decision is allowed to stand, there is the potential for serious injury to the dairy industry and its lenders without an equivalent corresponding benefit to the environment.

To be justified, the radical changes and increased regulation of the American dairy industry suggested by the Second Circuit's decision must be supported by the clear legislative intent of Congress as found in the express statutory language of the CWA. If this Court grants Petitioner's Writ of Certiorari, thus examining the Second Circuit decision, we believe that this Court will find no

support in the CWA for the Second Circuit decision. In light of the potentially large negative impact of the lower court decision, it is vital to the continued viability of America's dairy industry and its lenders that this Court grant Petitioner's Writ of Certiorari and examine the issues.

2. If allowed to stand, the Second Circuit decision will have potentially serious adverse economic consequences for all dairy farms.

A. If large dairy farms must meet CAFO requirements, the following results may be expected for America's dairy industry:

- Large dairy farms will be burdened with over-regulation disproportionate to their potential impact on the environment and unsupportable by the present economics of the dairy industry. There is also a danger of double regulation by both federal and state regulators. This is contrary to the present de-regulatory climate in Washington, and needlessly complicates dairy farming.
- The cost of compliance with environmental requirements, both in time and money, will significantly increase for large dairy farms, making them less profitable and increasing the upward pressure on dairy prices to consumers. For some large dairy farmers, these increased costs may make it harder to obtain sufficient operating credit.
- Dairy farmers may be discouraged from increasing the size of their dairy operations to the 700 animal (CAFO-sized) level or above. This will make the economies of scale inherent in larger farms less available to dairy farmers, thus stagnating an important

industry, and will create an artificial economic barrier for farmers trying to expand.

B. If the discharges from manure spreading equipment are considered as a point source discharge, the following results may be expected for America's dairy industry:

- All dairy farms will be burdened with excessive restrictions on manure handling which are both disproportionate to their potential negative impact on the environment, and unsupportable by the present economics of the dairy industry. There is also a danger of double regulation by both federal and state regulators, since some states may already have existing standards in place governing this activity.
- Manure management practices will change drastically, becoming more inefficient and costly. It may be necessary to dispose of manure by other more expensive means if it cannot be applied to the land as a crop fertilizer. Farmers may be required to construct larger manure storage facilities in areas where the local soil type or weather permit less frequent application to the land. It may also be necessary to purchase other forms of soil nutrients or man-made fertilizer to offset the inability to use manure.
- For many dairy farmers, the increased costs of environmental compliance are not recoverable under present dairy industry economics. There is the real potential for family dairy farmers to be driven out of business in large numbers. In the alternative, to cover these costs it may be necessary to provide state or federal subsidies to maintain these dairy farm units, or to increase dairy product prices to the consumer. A further concern is that these increased production costs may seriously hamper the ability of

American dairy producers to compete with dairy products in the world market, as well as with foreign dairy products appearing in the U.S., due to recent changes in the General Agreement on Tariffs and Taxes ("GATT"). Any perceived potential corresponding benefit there may be to the environment from the Second Circuit decision does not warrant these serious, drastic human and economic consequences.

- In 1993, the Environmental Protection Agency published final rules[2] on the acceptable application of biosolids (sewage sludge) to agricultural and non-agricultural land pursuant to the CWA. The "message" sent by the Second Circuit Court's decision on manure may well reduce the agricultural community's acceptance of biosolids as a soil nutrient option if manure from their own farm is considered a point source. Since there is a ban on ocean dumping, which was the previous disposal method for this waste, the Second Circuit's decision may remove an important disposal alternative for biosolids material when few alternatives are available. This will put increased pressure on towns and municipalities trying to secure new outlets for biosolids disposal, and it may further drive up disposal costs to these communities.

3. The potential for economic harm to the dairy industry may also have potentially adverse consequences for agricultural lenders and rural communities.

- The increased costs of regulatory compliance may make many family dairy farms economically non-

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[2] 40 CFR Part 257 *et al.*

viable. If a sufficient number of these farmers are forced to leave farming, the sudden surplus of land for sale could significantly drive down the value of agricultural land to a level which makes the recapture of owner equity and the repayment of farm debts impossible.

- A dramatic reduction in the value of agricultural land also affects its value as collateral for new loans. Lower land values reduce the availability of new operating credit to all farmers, some of whom may lose access to the full amount of credit they need to stay in business because it is unsupported by the value of their land as collateral.
- Lenders will be hurt by a serious decline in land values. The credit quality of agricultural loan portfolios will deteriorate as increasing numbers of loans become delinquent due to borrowers' insufficient repayment ability. Without operating lines of credit, these dairy farmer borrowers will lose the ability to operate their farms effectively and to repay their loans. Eventually, these borrowers will default on their loan payments, and lenders will need to sell the loan collateral to pay off these loans. If the land collateral is undervalued, due to market conditions, its sale price will not be sufficient to pay off the loan it secures, and lenders will incur losses on these loans. Ultimately, lenders may be forced to raise interest rates to all their other borrowers to offset these loan losses and collection costs, and perhaps to meet increased regulatory capital requirements stemming from this adversity.
- The effect of many dairy farmers going out of business and increased lender interest rates will have an

overall negative affect on the local rural economy throughout America, which is already under negative pressures from other sources. A strong, locally-owned and operated dairy industry is critical for rural communities, such as Wyoming County, New York, to maintain their economic and environmental diversity. The presence of strong local agriculture in these rural communities assures the continued presence of needed open land and vistas, while its economic presence continues to support local supply, service and processing markets.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

October Term, 1994

SOUTHVIEW FARM and RICHARD H. POPP,

Petitioners,

against

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 94-1316

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SOUTHVIEW FARM AND RICHARD H. POPP,

Petitioners,

v.

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICUS CURIAE* STATE OF NEW YORK IN SUPPORT OF PETITIONERS

Interest of *Amicus Curiae*

The State of New York submits this brief in support of the Petition for a Writ Of Certiorari submitted by Southview Farm and Richard H. Popp. This case involves the overly-broad interpretation by the Court of Appeals for the Second Circuit

that (1) certain livestock operations that also grow crops as animal feed, and (2) certain agricultural activities such as the spreading and spraying of recycled animal wastes, are point sources of pollution subject to the permitting process under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*

Amicus submits that the interpretation by the Court of Appeals is unnecessarily broad which, if left unchallenged, will have a detrimental effect on all New York farmers who apply both organic and chemical fertilizers to their land. In particular, it will require dairy farmers who recycle animal wastes on farm cropland to apply for and comply with the conditions of a pollution discharge permit before being allowed to conduct the normal agricultural practice of applying manure to crop land. The failure to secure such a permit will not only subject New York farmers to burdensome compliance costs and regulatory sanctions, but also to protracted citizen suits under the CWA. The Court of Appeals' decision threatens the economic viability of a State industry which is already experiencing difficult times.

Agriculture is an important industry in New York, producing over $2.9 billion in cash receipts for 1992, the latest figures available. New York Agricultural Statistics Service and New York State Department of Agriculture and Markets, Division of Statistics, *New York Agricultural Statistics, 1993-94,* July 1994, Table 6 at 11. In 1993, there were 38,000 farms in this State, averaging 216 acres in size. *Id.*, Table 3, at 6. Livestock agriculture represents a substantial portion of New York's farm economy. In 1992, cash receipts from the sale of animals and the products they produce represented 65% of total farm cash receipts, with dairy products accounting for 51.9% of that number. *Id.,* Table 6 at 11. Cash receipts from the sale of milk during 1993 totaled $1.46 billion. *Id.*, at 47. New York ranks

third nationally in the production of milk. *Id.*, Table 7 at 12. Unlike large animal feedlots found in other parts of the United States, dairy farms and other livestock farm operations found in New York typically grow crops on the farm to feed the cattle housed there. The animal wastes generated by the animals are then collected and applied to the farm's fields for use as a crop fertilizer. The spreading of manure on the farm cropland is the ultimate recycling activity, serving not only as a source of the primary nutrients of nitrogen, phosphorus and potassium, but also providing organic matter and a variety of essential micro nutrients.

When Congress enacted the 1972 amendments to the Federal Water Pollution Control Act (FWPCA), 86 Stat. 816, codified as amended, 33 U.S.C. § 1251 *et seq.*, [later renamed the Clean Water Act ("CWA")], it intended to regulate the discharge of effluents from large animal feedlots or "concentrated animal feeding operations" (CAFO's). CAFO's, which are located throughout the United States, have insufficient acreage to grow crops and dispose of animal wastes. Consequently, vast amounts of manure accumulate but are not recycled on the farm's cropland. It appears clear that at the time of the enactment of the law, Congress did not intend to regulate dairy farms such as Southview, which recycle the manure back into the farm's cropland. *See*, 33 U.S.C. §1362(14) and 1972 U.S. Code Cong. & Admin. News ("USCCAN") 3668, 3761, Pub. L. No. 92-500 (supplemental views of Senator Robert Dole). Congress chose instead to regulate CAFO's, or large feedlots that do not grow crops on the farm.

The Court of Appeals has incorrectly determined that Southview Farm is a CAFO by misconstruing the "crop-

growing exception".[1] This requires crops to be grown in the exact location where the animals are confined, which in colder climates such as those in New York, would effectively necessitate that the crops be grown in the barn. The Court of Appeals has effectively negated the exception that was meant to exclude large livestock operations which grow crops for feed and have sufficient land to accept the recycled animal waste without causing environmental damage.

Of even greater consequence to New York agriculture is the court's alternate finding that small and mid-size farms (i.e., those farms with fewer than 700 mature dairy cows or 1,000 slaughter and feeder cattle) may be subject to the permit requirements under the Clean Water Act when engaged in the normal agricultural practices of spraying and spreading animal wastes on crop fields. The court specifically found that certain types of agricultural equipment, such as sprayers and trucks used for spreading manure, are point sources subject to regulation under the CWA. If this decision is not overturned, farms of all sizes could be subject to the CWA permit process simply because of the diffuse spraying or spreading of manure that eventually finds its way to streams through runoff. Such an interpretation is contrary to the intent of Congress, which provided that the regulation and enforcement of diffuse nonpoint source discharges of pollution such as animal wastes be left to the States.

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[1]As explained later, a large livestock operation is not defined as a CAFO if crops or forage are not grown "over any portion of the lot or facility". 40 C.F.R. § 122.23(b)(ii).

The State of New York is concerned that the Court of Appeals ruling, if not reversed, will have a detrimental impact on agriculture.

ARGUMENT

POINT I

The court erred in finding that Southview Farm was a CAFO

The Court of Appeals erred in finding that Southview Farm, and other similar farms which have sufficient cropland, are CAFO's and therefore point sources under the CWA. When the Federal Water Pollution Control Act was enacted in 1948 Congress intended that the States, and not the Federal Government, "lead the national effort to prevent, control and abate water pollution." *See,* Sen. Rep. No. 92-414, 1st Sess., reprinted in 1972 USCCAN 3668, 3669, for a discussion of earlier efforts to control water pollution.

In 1972, amendments to the Federal Water Pollution Control Act were enacted to clean up the nation's navigable waters by 1985. S. Rep. No. 92-414, 92d Cong., 1st Sess., *reprinted in* 1972 USCCAN 3668, 3674. The law created the National Pollution Discharge Elimination System (NPDES), which made it illegal to discharge a pollutant from a point source without first obtaining a permit (NPDES permit). 33 U.S.C. § 1342(a)(1). The law also provides that States may issue such permits (SPDES permits) pursuant to a state pollutant discharge elimination system upon the condition that all such discharges meet the requirements of the FWPCA. 33 U.S.C. § 1342(b).

New York State is authorized to issue SPDES permits under the FWPCA. 33 U.S.C. § 1342(b)

The definition of "point source" includes CAFO's. 33 U.S.C. § 1362(14). EPA regulations define a CAFO as: an "animal feeding operation" which meets the criteria in Appendix B of this part; or which the Director designates under paragraph (c) of this section. 40 C.F.R. § 122.23(b)(3). An "animal feeding operation" is defined as a lot or facility (other than an aquatic animal producing facility) where the following conditions are met:

> (i) animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
>
> (ii) crops, vegetation forage growth, or post harvest residues are not sustained in the normal growing season *over any portion of the lot or facility*.

40 C.F.R. § 122.23(b).

Appendix B sets forth the criteria for determining the minimum number of animals required for a concentrated animal feeding operation to include, *inter alia*, more than (1) 1,000 slaughter and feeder cattle, and (2) 700 mature dairy cattle (whether milked or dry).

In order to determine whether a livestock operation is an animal feeding operation, one must determine whether crops or other vegetative growth are being sustained over any portion of

the "lot or facility". The Court of Appeals mistakenly interpreted the terms "lot or facility" to include only the restricted area where the animals are housed and fed and not other parts of the farm (or facility) where crops are grown. As a result, the court effectively eliminated the "crop growing exception" which reflects Congress' intent to regulate only large feedlots without the capacity to recycle the manure, unlike those found in New York.

Such an interpretation makes no practical sense. As a result of extreme climactic conditions, cattle raised in New York must be housed and fed in barns and not in open feedlots typically found in other parts of the country. It is impossible to grow crops in a barn. Equally impractical is the requirement under this decision that cattle "pasture" or graze in the fields where the crops are being grown. Corn stalks (corn is a typical animal feed on New York farms) averaging eight to ten feet when full grown, would ultimately be trampled by pasturing animals. It would also be impossible to separate the animal wastes from the crops, thereby preventing their use as animal feed. When cows do "pasture", they do so not on crop land, but in fields that are not currently growing crops. In interpreting the "crop growing exception", the courts must adopt a reasonable construction and the Court of Appeals has failed to do that.

In its decision the Court of Appeals interpreted "facility" in such a way that it negates the "crop growing exception". A "facility" cannot reasonably mean less than the entire farm. The court's interpretation is not consistent with the Congressional intent to lessen barnyard runoff of animal wastes only from

feedlots that have insufficient cropland properly to absorb the manure.[2] In enacting the 1972 amendments, Congress clearly recognized that the development of large and intensive livestock feedlots, and the resulting increase of animal wastes requiring proper disposal, were producing massive concentrations of manure in small areas. S. Rep. No. 92-414, 92d Cong., 1st Sess., *reprinted in* 1972 USCCAN 3668, 3761, (supplemental views of Senator Robert Dole). Congress specifically intended to include these large feedlots, or CAFO's, as point sources of pollution subject to the NPDES effluent limitations.

It is also clear that Congress generally regarded the runoff of agricultural byproducts, including animal wastes, soil erosion, fertilizers, pesticides and other farm chemicals to be nonpoint source pollution. S. Rep. No. 92-414, 92d Cong., 1st Sess., *reprinted in* 1972 USCCAN 3668, 3705 and 33 U.S.C. § 1288(b)(2)(F). Instead of regulating such discharges, EPA was instructed to provide funding to the Department of Agriculture to conduct research and provide technical and financial assistance to promote sound land use and pollution control that would lead to "the installation of systems for management, storing and recycling of animal and poultry wastes and other agricultural related pollutants." S. Rep. No. 92-414, 92d Cong.,

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[2]It is primarily the effects of nitrogen and phosphorous that contribute to water pollution. Concentrations of nitrogen in excess of 10 milligrams per liter in drinking water are considered dangerous, while excessive amounts of nitrogen and phosphorous result in eutrophication (the accelerated growth algae). *See, Draft Proposal For Legislation to Control Water Pollution From Agricultural Sources*, 59 Cornell L. Rev. 1097, 1101 (1974).

1st Sess., *reprinted in* 1972 USCCAN 3668, 3718. Implementation of these land use practices was to be accomplished under the State Section 208 programs.

In discussing the issue of animal wastes, the House Committee on Governmental Operations, in 1974, recognized the nutrient value of animal wastes, by calling for a greater emphasis on recycling and reusing. Congressman Henry S. Reuss summed up the problem by noting:

> It is certainly ironic that as we face a terrible shortage of chemical fertilizers, and as more and more precious natural gas feedstocks are devoted to the production of those fertilizers, we continue to waste the priceless animal resources which have strengthened the soil and increased production for thousands of years, by allowing them to percolate or flow into our streams and cause problems there. The whole thing would cause a stranger to laugh at this planet.

H. Rept. 93-1012, *Control of Pollution From Animal Feedlots and Reuse of Animal Wastes*, April 25, 1974, at 47.

Prior to the recognition of the environmental concerns associated with agriculture, farmers in the Northeast were concerned with determining and utilizing proper levels of nutrients (nitrogen, phosphorus, etc.) to maximize crop yields. Now, with new recognition of their role as stewards of the land entrusted to them, they are also concerned about the levels at which certain of these nutrients are entering the Nation's waters.

Farmers recognize that maximizing profits and protecting the environment are not mutually exclusive concepts. With a properly designed nutrient management plan, a farmer can reduce fertilizer costs while also environmentally controlling the "disposal of animal waste". In implementing such a plan, the crop soil is first tested to determine the amount of nutrients needed to grow the animal feed. Specific manure application rates are then established and application methods are selected to avoid the runoff of the nutrients. After consuming the crops, the animals will then produce more wastes that again will be recycled as nutrients for the growing crops. For a further discussion of this process and farm nutrient issues in general, *see, Liquid Manure Application Systems, Design, Management, and Environmental Assessment,* Proceedings from Liquid Manure Application Systems Conference; Cooperative Extension Publication NRAES-79 (1979).

Essential to the success of any farm nutrient management plan is the requirement that there be sufficient land not only to grow sufficient crops to feed the animals but also to absorb the manure. A successful nutrient management plan is dependent upon the amount of cropland available relative to the size of the herd. As the size of the herd increases, a corresponding increase in cropland must also occur. According to Dr. Stuart Klausner of Cornell University's School of Agriculture and Life Sciences, an animal unit (the equivalent of a 1,000 pound animal) to acreage density ratio of between 1 and 1.5 (with a typical animal feed ration of corn and alfalfa) will provide an adequate land base for spreading the manure while also supplying sufficient nitrogen to approximate crop requirements. *See*, Klausner, "Animal Density Guidelines", *What's Cropping Up,* Vol. 4, No. 1 (1994) for a more detailed explanation.

The record indicates that Southview had an animal unit to acreage density ratio of 1.35 (Trial Testimony, pp. 1947-1949), well within the favorable limits recommended by Dr. Klausner. In these cases, if the manure is properly handled, there should be little runoff since there is sufficient cropland to absorb the manure.

In including CAFO's as point sources, it was the intent of Congress to regulate large livestock operations that had insufficient cropland to utilize the nutrients contained in the manure and to exclude from regulation farms such as Southview that have sufficient cropland to recycle their manure properly. *See*, *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055 (5th Cir. 1991), in which the feedlot consisted of 20,000 to 30,000 head of cattle with only 230.9 acres. Feedlots with such a high animal to acreage ratio can create an environmental "nightmare" unless closely regulated. This is the type of operation that Congress clearly intended to regulate under the NPDES permit process. It did not intend to regulate farms such as Southview which have sufficient cropland to recycle the manure properly.

It is clear that in improperly classifying as CAFO's large New York farms that also grow crops for animal feed, the Court of Appeals has disregarded the intent of Congress.

POINT II

The discharge of manure from agricultural spreading and spraying equipment over a diffuse area of the farm is not a point source discharge

In addition to finding that Southview Farm was a CAFO and therefore a point source, the Court of Appeals incorrectly ruled that the agricultural equipment used to spray and spread manure were point sources.

The CWA distinguishes between point and nonpoint sources of water pollution. Point source pollution results from a clearly discernable discharge point, such as a pipe, ditch, or CAFO. 33 U.S.C. § 1362(14). Nonpoint source pollution, however, comes from a diffused point of discharge, such as fertilizer runoff from an open field. While recognizing that controlling nonpoint source pollution would be required if water quality goals were to be attained, Congress clearly intended, because of the large number and types of nonpoint sources of pollution, the site specific nature of the pollution and the lack of technology to control the problem, that the runoff of agricultural byproducts be exempt from the permitting process established under the Clean Water Act and instead be addressed through the Section 208 program. S. Rep. No. 92-414, 92d Cong., 1st Sess., *reprinted in* 1972 USCCAN 3668, 3705.

Nonpoint source pollution has been defined by the courts as the "unchanneled and uncollected surface water" (*Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976)), "a runoff of pesticides from farmlands" (*Natural Resources Defense Council v. E.P.A.*, 915 F.2d 1314, 1316 (9th Cir. 1990)), and the "runoff...[of] agricultural chemicals from

farmlands, . . . and other substances washed by rain, in diffuse patterns, over the land and into navigable waters" (*United States v. Plaza Health Labs, Inc.*, 3 F.3d 643, 652 (2d Cir. 1993) (Oakes, J. dissenting)). With the exception of CAFO's, most agriculture pollution is nonpoint because it is being discharged over a diffused area.

When the courts have at times attempted to regulate certain nonpoint agricultural discharges under the permit provisions of the CWA, Congress has acted quickly to clarify its intent. For example, when shortly after the enactment of the 1972 amendments EPA attempted to exempt from the NPDES permit process smaller industrial, commercial and agricultural operations which had flows discharged through pipes, the Court of Appeals for the District of Columbia Circuit ruled that EPA had exceeded its authority. *See, Natural Resources Defense Council v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd sub nom. Natural Resources Defense Council v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977). EPA then amended its regulation to cover operations of all sizes. Congress, in sending a clear message regarding the special treatment agricultural activities were to receive, promptly amended not one, but three separate sections of the CWA to (1) exclude from the definition of point source "return flows from irrigated agriculture" (33 U.S.C. § 1362(14)), (2) specifically prohibit the EPA from requiring, directly or indirectly, a NPDES permit for return flows from irrigation (33 U.S.C. § 1342(l)) and (3) specify that irrigation return flows would be covered under the Section 208 nonpoint source program (33 U.S.C. § 1288(b)(2)(F)).

In correcting the interpretations of the courts in the *Train* case, Congress made clear that not only did it intend to exempt

discharges from "return flows" from agricultural, but also other forms of agricultural runoff.

> Testimony in field hearings suggested that effluent limits based on technological methods may not be appropriate for control of return flow pollutants and the committee determined that these sources were practically indistinguishable from any other agricultural runoff, which may or may not involve a similar discrete point of entry into a watercourse. All such sources, regardless of the manner in which the flow was applied to the agricultural land, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of Section 208(b)(2)(F).

S. Rep. No. 95-370, 95th Cong., 1st Sess., *reprinted in* 1977 USCCAN 4326, 4360.

It is obvious that Congress was less concerned with the method of application and more concerned with the ultimate effect of the discharge and the best method to contain it.

Similarly, when in 1987 Congress was acting to require NPDES permits for industrial and commercial stormwater discharges, it made it clear that stormwater runoff from agricultural sources would not be included in the definition of point source. Specifically, Congress, in the Water Quality Act of 1987, amended the term "point source" to read, as it does today: "this term does not include agricultural stormwater discharges and return flows from irrigated agriculture." Pub. L. No. 100-4, Section 503, 101 Stat., 5, codified at 33 U.S.C. 1362(14). In

doing so, it seems clear that Congress wished to exempt most agricultural activities.

Throughout the history of the CWA, Congress has recognized that certain normal agricultural practices, including the spreading of manure, contribute to the pollution of the Nation's waters.[3] It has, however, except in very limited circumstances, left the regulation of the discharge of agricultural pollutants to the State as a nonpoint source under the Section 208 program and the more recently enacted Section 319 program. 33 U.S.C. §§ 1329, 1388.

The manure spreading wagon and the spigot used to spray the liquid on various fields do not meet the definition of point source under the CWA when they are employed in their normal manner to spread or diffuse manure on agricultural land. The terms "spread" and "diffused" have a meaning in total opposition to the words "discerned, confined and discrete" that are used in the CWA to describe a point source. Congress' intent to exempt most agricultural activities from NPDES permits, coupled with the literal meaning of the words spreading and spraying, leads to the common sense conclusion that the spreading and spraying of manure are normal agricultural practices of the type meant to be

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[3]The CWA does contain authority for considering the usage of certain equipment in determining whether it is a point source. CWA § 404 (33 U.S.C. § 1344) classifies certain equipment used in dredging and filling activities to be a point sources, unless the equipment is used in "normal farming activities," including plowing, seeding and cultivating. *See, Avoyelles Sportsmen's League, Inc. v. Alexander,* 473 F. Supp. 525 (W.D. La 1979).

exempt from enforcement under the CWA. The Court of Appeals ruling to the contrary is incorrect.

CONCLUSION

The Court should grant the petition for certiorari.

Dated: Albany, New York

March 28, 1995

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1994

SOUTHVIEW FARM and RICHARD H. POPP,

Petitioners,

against

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE JOINT LEGISLATIVE COMMISSION ON THE DAIRY INDUSTRY, JOHN R. KUHL, CHAIRMAN AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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No. 94-1316

In The Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHVIEW FARM AND RICHARD H. POPP,
Petitioners,

v.

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al., Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE JOINT LEGISLATIVE COMMISSION ON THE DAIRY INDUSTRY - JOHN R. KUHL, CHAIRMAN

This brief is filed upon the written consent of the parties pursuant to *Supreme Court Rule* 37.2.

INTEREST OF *AMICUS CURIAE*

The New York Joint Legislative Commission on the Dairy Industry is a bipartisan and bicameral body composed of five members of the state Senate and five members of the Assembly. The Chairman, Senator John R. Kuhl, Jr., is also Chairman of the Senate Agriculture Committee. The Commission maintains a research staff of dairy industry experts and has conducted public hearings and issued research reports on dairy industry issues since it was established in 1986.

The Commission was established because the Legislature found the existence of "severe economic pressures which are affecting and which may affect the industry and dairy farmers in particular." (1986 N.Y. Laws, Chap. 50) Five other northeastern states made similar findings of emergency economic conditions for dairy farmers when the farm price of milk dropped sharply in 1991.[1]

The *amicus curiae* holds a comprehensive statutory mandate to investigate and analyze the economic, environmental, marketing and regulatory pressures affecting the dairy industry and to recommend policies designed to maintain its economic vigor. The dairy industry provides employment for 60,000 New York citizens in the production, processing and distribution

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[1]Conn. Public Acts 91-312, §45; Mass. Gen. L., Ch. 94A, §10 (Executive finding); Vermont Stat. Ann., tit. 6, Ch. 161; Maine Rev. Stat. Ann., tit. 7 §2954; N.J. Stat. Ann., §4:12A-1 (Executive finding).

components of the industry. (*id.*) Despite the steady loss of dairy farms, New York remains the third largest milk producing state in the nation. (*id.*)

SUMMARY OF ARGUMENT

1. Three business days before oral arguments in the Court of Appeals, the court accepted an *amicus curiae* brief from the U.S. Environmental Protection Agency which, for the first time, raised the issue of whether the dairy farm was a "Concentrated Animal Feeding Operation". That issue had not been briefed by either party. The Court of Appeals refused a request by Southview for time to file an answering brief. That action violated FED. R. APP. P. 29. The unanswered government brief formed the basis of the court's alternative holding that Southview Farm is a C.A.F.O. This "so far departed from the accepted and usual course of judicial proceedings .. as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10(1)(a). The appropriate disposition would seem to be summary reversal pursuant to Rule 16.

2. The Court of Appeals holding that a manure spreader is a "point source" under the Clean Water Act has vast implications for all forms of animal agriculture throughout the nation. Even the U.S. Environmental Protection Agency has disapproved this holding. Manure spreaders are always used in rural terrain which is laced

with brooks, streams, gullies, drainage ditches, and ponds. All of these are "waters of the United States," within the technical meaning of that term. Accordingly, for all practical purposes, the decision below subjects manure spreaders to NPDES permit requirements, effluent limitations, and other regulation, as well as citizen initiated litigation. Virtually all dairy farms in the United States dispose of manure on crop lands and fields. There are almost 150,000 dairy farm operations in the United States. All will be affected by the "point source" holding of the Court of Appeals.

3. Run-off from the croplands and fields of dairy farms was never intended to be regulated by the Clean Water Act. The drafters of the Act intended agricultural run-off to be treated as "non-point sources," subject to a non-regulatory strategy involving research, education and management directed by the states. The language of the Act itself, and its legislative history, explicitly refer to agricultural runoff as a non-point source. When the Act was adopted in 1972, Congress was fully aware that spreading manure on fields and crops was the standard and best method of disposal.

4. The term "Concentrated Animal Feeding Operation," as used in the Clean Water Act, should be read in the light of common agricultural usage. A "feeding operation" ("feeder cattle") is a term used in distinction from a "milking operation" ("milkers"). Congress intended to regulate feedlots for beef cattle, which were then

emerging as a potentially serious source of pollution. Feedlots concentrate manure directly on the ground in confined open lots. Dairy farm operations, even very large ones, do not concentrate manure because it is collected and widely dispersed on fields where crops and forage are grown to feed the cows. E.P.A.'s original regulations correctly construed the Act as excluding agricultural operations which raised their own crops or forage. The Court of Appeals eliminated that exclusion by construing it so narrowly that the crops and forage must be raised inside the dairy barn for the exclusion to apply. This was simply a judicial repeal of the statutory and regulatory exclusion.

I.

WITH RESPECT TO THE C.A.F.O. ISSUE, THIS COURT SHOULD SUMMARILY REVERSE AND REMAND BECAUSE THE COURT OF APPEALS VIOLATED FED. R. APP. P. 29.

Three business days before oral arguments in the Court of Appeals, the court accepted an *amicus curiae* brief from the U.S. Environmental Protection Agency. The government brief argued that the dairy farm was a "Concentrated Animal Feeding Operation." That was the first time the issue was introduced in the case. (*Petition*, 12) The Court of Appeals refused Southview's motion for time to file an answering brief. (*id.*) That action violated

fundamental fairness as well as the explicit terms of Fed. R. App. P. 29. The *amicus curiae* recognizes that it is not the usual function of an *amicus* to raise procedural issues from which it has suffered no prejudice. But it is submitted that this error so prejudiced the proper functioning of the appellate process that this Court may and should take cognizance of the matter *sua sponte*. The unanswered government brief formed the basis for the court's holding that Southview Farm is a C.A.F.O. (34 F.3d at 123) Southview and the Farm Bureau, as *amicus curiae*, were the sole litigators in a position to critique the government's argument from the standpoint of agricultural realities. They were simply shut out of the adjudicative process. This directly resulted in a holding which is premised on false assumptions about basic farming practices. The refusal to hear one side of the argument "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10(1)(a). The appropriate disposition would seem to be summary reversal and remand pursuant to Rule 16 with respect to the C.A.F.O. issue.

II.

THE COURT SHOULD REVIEW THE TWO CONSTRUCTIONS OF THE CLEAN WATER ACT INVOLVED IN THIS CASE BECAUSE BOTH WILL

HAVE FAR REACHING AND ONEROUS IMPACTS ON FARMERS THROUGHOUT THE NATION

The Court of Appeals held that a manure spreader is a "point source" under the Clean Water Act. (34 F.3d at 119) Even the U.S. Environmental Protection Agency has refused to support this holding. (See p. 7, *infra*.) This holding has vast implications for all forms of animal agriculture throughout the nation. Manure spreaders are always used in rural terrain. This is laced with brooks, streams, gullies, drainage ditches, and ponds. All of these are "waters of the United States," within the technical meaning of that term. *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 (1987) ("[T]he Act applies to virtually all surface water in the country ...."); *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985); 40 C.F.R. §122.2 Accordingly, the decision below subjects manure spreaders to NPDES or SPDES permit requirement, effluent limitations, citizen enforcement actions, as well as government initiated civil and criminal enforcement actions.

Virtually all dairy farms in the country dispose of manure on fields and use spreading equipment. See *Methods and Practices for Controlling Water Pollution from Agricultural Nonpoint Sources*, 53 (U.S. Envir. Protection Agency, 1973) (E.P.A. 430/9-73-015) D. Bath *et al.*, *Dairy Cattle: Principles Practices, Problems, Profits*, p. 15, Table 1.10 (Lea & Febiger, Phila. 1985) There are almost 150,000 dairy farm operations in the United States. *Milk Production: February 1995*, p. 20 (U.S. Dept. of

Agriculture, National Agricultural Statistics Service) All but a few will be affected by the decision below.

The Environmental Protection Agency has issued a position paper which states:

> "In the *Southview Farm* case, the Circuit Court agreed with the citizen plaintiffs' alternative argument that, 'manure spreading vehicles themselves were point sources. The collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point sources under the case law.' *Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994). EPA does not endorse this interpretation and believes it was unnecessary for the Court to reach this point because Southview Farm operated a 'large' CAFO. As a large CAFO, the means of conveyance (i.e., manure spreading vehicles) was irrelevant for determining whether there was a point discharge." [*Perceptions About E.P.A.'s Actions in the Southview Farm Case*, U.S. Envir. Protection Agency, Office of Water, p. 3 (Dec. 12, 1994)] (See Appendix.)

In fact, the determination of the Court of Appeals was, as the court characterized it, an alternative holding. (34 F.3d at 119) Alternative holding stands as *stare decisis*. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

E.P.A.'s official recognition that the Court of Appeals was in error is alone a compelling reason for this Court to grant certiorari to dispel the confusion. The agency's

disavowal of the holding does not protect farmers because they are now open to citizen enforcement actions.

The CAFO holding of the Court below will impact all farms having 300 mature dairy cattle and which discharge manure "through a manmade ditch, flushing system or other similar manmade device." 40 C.F.R. §122, App. B ("and either one of the following conditions are met") Almost all farms utilize manmade drainage systems and devices. See E.P.A., *Methods and Practices for Controlling Water Pollution from Agricultural Nonpoint Sources*, p. 3-18 (1973) Accordingly, virtually all farms with 300 or more animals will become "medium size CAFO's" under E.P.A.'s rules. (See *Perceptions and Facts About the Southview Farm Decision*, p. 1.)

III.

CONGRESS NEVER INTENDED TO REGULATE AS A POINT SOURCE RUNOFF FROM FARM FIELDS AND CROPLANDS

The statutory text of the Clean Water Act, 86 Stat. 816, twice refers to runoff from agricultural land as a non-point source.

One provision, explicitly categorizes "runoff from manure disposal areas and from land used for livestock and crop production" as a nonpoint source. 33 U.S.C.

§1288(b)(2)(F)[2] Another section refers to "agricultural and silvicultural activities, including runoff from fields and crops and forest lands" as "nonpoint sources of pollutants." 33 U.S.C. §1314(f)[3] Both sections were enacted by Congress in the Federal Water Pollution Control Amendments of 1972, 86 Stat. 816, the same legislation which defined the term "point source." 86 Stat. 816, 886 The Court of Appeals overlooked both sections. The Court erroneously concentrated on the definition of "point source" in isolation from the rest of the statute. (31 F.3d

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[2]33 U.S.C. §1288(b)(2)(F) in relevant part provides: "Any plan shall include ... (F) a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods ... to control to the extent feasible such sources;"

[3]33 U.S.C. §1314(f) in relevant part provides:

"The Administrator ... shall issue ... information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from - (A) agricultural and silvicultural activities, including runoff from fields and crops and forest lands;"

114, 117-118.) *Department of Revenue of Oregon* v. *ACF Industries*, 510 U.S. ___, 114 S. Ct. 843, 849 (1994); *Gade* v. *National Solid Wastes Mg't. Assn.*, 505 U.S. ____, 112 S.Ct. 2374, 2383 (1992); *New York* v. *United States*, 505 U.S. ___, 112 S.Ct. 2408, 2425 (1992) This Court has made it clear that "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme - because the same terminology is used elsewhere in a context that makes its meaning clear ..." *United Savings Ass'n.* v. *Timbers of Inwood Forest*, Assoc., 484 U.S. 365, 371 (1988); *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989); *Pavelic & LeFlore* v. *Marvel Entertainment*, 493 U.S. 120, 123 (1989); *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986).[4]

The legislative history of the Federal Water Pollution Control Amendments of 1972 also demonstrates Congress' clear intent to classify agricultural runoff as a nonpoint source. *Senate Report No.* 92-414 reprinted in 2 *U.S. Code Cong. & Admin. News* 3677 (1972) ("The bill also requires the Administration to conduct research into better methods of controlling pollutants from nonpoint sources

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[4]Another canon of statutory construction is also involved. This court has noted that the Clean Water Act "anticipates a partnership between the States and the Federal government, animated by a shared objective," and in such a context, preemption of the states' role should not be readily found. *New York* v. *United States*, 505 U.S. ___, 112 S. Ct. 2408, 2424 (1992).

such as agricultural runoff."); *id.*, §3705 "One of the most significant aspects of this year's hearings on the pending legislation was the information presented on the degree to which nonpoint sources contribute to water pollution. Agricultural runoff, animal wastes, soil erosion, fertilizers, pesticides and other farm chemicals are a part of runoff ..." (Emph. supplied) The extended commentary on Section 304(e)(2)(A) 33 U.S.C. §1314, is particularly significant. The Senate report notes that the section requires the Administrator of E.P.A. "to issue information to the States and to the public on the processes, procedures, and methods to control pollution related to nonpoint sources. Included within this category are activities such as agriculture." 2 *U.S. Code Cong. & Admin. News*, 3718 (1972) It is clear that Congress was very much aware that sediment from agricultural runoff "is by volume our major pollutant" and that "Fertilizer and pesticide runoff are also major agricultural nonpoint sources." (*id.*) Congress specifically chose to deal with agricultural runoff in a non-regulatory way.

The study of methods for controlling "runoff from fields and crop ... lands" was conducted as required by §304(e), 33 U.S.C. §1314(f). The Administrator of E.P.A., in consultation with the U.S. Department of Agriculture, issued the required report, entitled *Methods and Practices for Controlling Water Pollution from Agricultural Nonpoint Sources* (1973) (E.P.A. Doc. No. 430/9-73-015) This document demonstrates the Administrator's contemporaneous understanding of the 1972 legislation.

An entire chapter is devoted to the appropriate handling of animal wastes. (*id.* 53-58) The report notes that,

> "Land is a nonpoint source of pollutants to water systems, mainly by means of erosion. The application of animal wastes to land can increase pollution if proper practices are not followed. When animal wastes are properly applied to land, the practices is a highly effective and acceptable means for disposal." (*id.* 53)

The report treats as nonpoint sources "animal wastes applied to agricultural land," including "waste removed from feeding facilities" and "storm runoff and snow melt." (*id.*) There is an entire section devoted to "Wastes Removed from Animal Confinement Facilities" (*id.*, 53-54), and "Methods of Waste Application," to land. (*id.* 54) The agency was fully aware of the widespread practice of spreading manure by mechanical equipment. "The surface application methods include surface and sprinkler irrigation techniques, and tank spreaders ... The tank spreader methods require more labor than irrigation methods." (*id.*) The Report also recognizes the need for water erosion control methods (*id.* 55; 3-24), including "natural or outlets ... for safe disposal of runoff from fields" (*id.* 18), as well as the use of pipe outlets. (*id.*) All of these devices are treated as nonpoint sources.

Subsequently, Congress held extensive oversight hearings on E.P.A.'s enforcement policy with respect to feedlots, but never disturbed the policy of treating agricultural runoff as a nonpoint source. *Control of Pollution from Animal Feedlots: Hearings Before a*

Subcommittee of the Committee on Government Operation of the House of Representatives, 93rd Cong., 1st Sess. (1973); *Control of Pollution from Animal Feedlots and Reuse of Animal Wastes*, H.R. Rep. No. 93-1012, 93rd Cong., 2d. Sess. (1974) Congress' only intervention has been to narrow the definition of point source in order to exempt agricultural activities.

IV.

CONGRESS NEVER INTENDED TO TREAT CONVENTIONAL DAIRY FARMS WHICH GROW THEIR OWN FEED AND FORAGE CROPS AS CONCENTRATED ANIMAL FEEDING OPERATIONS

Before adoption of the Water Pollution Control Amendments of 1972, the Senate Subcommittee on Air and Water Pollution held a hearing exclusively addressed to feedlot operations. *Hearings Before the Subcommittee on Air and Water Pollution*, 92d Cong. 1st Sess. (1971) The testimony and appendices establish that the primary problem facing Congress was the recent development of beef feedlots - large concentrations of animals in confined open spaces. (*id.*, 2517, 2547, 2553, 2565.) Dairy farms, even large ones, concentrate animals, but not waste. The animal waste is deposited initially on the barn floor, then collected and dispersed on the land, where it is taken up and controlled by crops and vegetation. See *Methods and Practices for Controlling Water Pollution from Agricultural*

Nonpoint Sources, 53-57, (U.S. Environmental Protection Agency, 1973) The use of pasture land was not, in 1972, and is not now, the primary source of nutrition for dairy cows.[5] Pasturage cannot provide adequate nutrients for milk production in the volume necessary to sustain a dairy farm.

The "concentrated animal feeding operation" provision in 33 U.S.C. §1362(14) was addressed primarily to beef feedlots. The term "feeding operation" itself distinguishes it from a "breeding" or "dairy operation." In agriculture, "feeder" animals are animals being fattened for slaughter. The remote origins of the statutory language can be found in regulations of the Kansas Board of Health presented to the Kansas City hearing. *Hearings, supra*, p. 2561. They refer to areas "in which no vegetation, intended for animal food, is growing." (*id.*) E.P.A.'s initial understanding of the statutory term was correct. It excluded "a lot of facility" were "crops, vegetation, forage growth, or post harvest residues are not sustained ..." 40 C.F.R. §122.23(b)(ii) The House Committee on Government Operations held oversight hearings in 1973 on E.P.A.'s proposed NPDES regulations. The Committee received in evidence comments by the Secretary of Agriculture to the E.P.A. Administrator. The Secretary suggested the following definition:

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[5]See D. Bath *et al., Dairy Cattle: Principles, Practices, Problems, Profits*, 155-156 (Phila. 1985).

> "A 'Concentrated Animal Feeding Operation' is a feed lot, feed yard, or confined feeding facility having more than 300 animal units at one time. Feed lots, feed yard, or confined feeding facilities shall mean the feeding of livestock on sites or facilities from which wastes must be removed and that are not normally used for raising crops, or on which no vegetation intended for livestock feeding is growing."[6]

This expresses the original and correct understanding of the statutory term. See also definition of "feedlot" in U.S. Environmental Protection Agency, *Common Environmental Terms*, p. 9 (1974)

The 1973 E.P.A. report, *Methods and Practices for Controlling Water Pollution from Agricultural Nonpoint Sources*, also throws light on the agency's original understanding of the term "post harvest residues". That report contains the following definitions on page 73:

> "crop residue - The portion of a plant or crop left in the field after harvest.
>
> "crop residue management - Use of that portion of the plant or crop left in the field after harvest for protection or improvement of the soil."

---

[6]*Hearings: Control of Pollution From Animal Feedlots*, H. Rep. Comm. on Government Operations, 93rd Cong. 1st Sess., p. 873 (1973).

The most familiar example of "post harvest residues" would be the stubble of corn stalks left on farm fields. The original Congressional and administrative intent to exclude conventional farms which grow their own feed and forage has been totally nullified by the Court of Appeals. The result of the court's construction is that crops, vegetation, forage growth or post harvest residues must be grown inside the barn or dairy cows must be raised solely on pasture with no shelter at all. This simply amounts to judicial nullification of the statutory intent and repeal of the words of the regulations.

CONCLUSION

For all the foregoing reasons the *amicus curiae* urges this Court to grant the Petition for Certiorari.

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March 30, 1995

APPENDIX

U.S. ENVIRONMENTAL PROTECTION AGENCY
Office of Water
Washington, D.C. 20460

PERCEPTIONS AND FACTS ABOUT THE SOUTHVIEW FARM DECISION

December 12, 1994

PERCEPTION #1. All farmers may face regulatory controls for manure spreading.

REALITY: The *Southview Farm* case is about concentrated animal feeding operations, as defined by EPA regulations, not farming operations generally. Under the express terms of the Clean Water Act, concentrated animal feeding operations (CAFOs) are specifically subject to permit requirements. Other farming operations are not subject to CWA permit requirements; most feedlots are not subject to the permit requirements. This case did not change the law on this point.

Not all feedlots are CAFOs. The first threshold question is whether a feedlot is an "animal feeding operation (AFO)," i.e., a lot or facility where animals are (1) stabled/confined and fed/maintained for a total of 45 days or more in any 12-month period and (2) crops, vegetation, forage growth or post harvest residues are not sustained over any portion of the lot or facility. Not all AFOs are

CAFOs. CAFOs are AFOs that meet certain criteria based on size, manner of waste conveyance, and, in some cases, whether a representative of the permitting authority has visited the AFO personally.

Generally, only owners and operators of CAFOs may face regulatory controls for spreading of the manure produced by their facility. A CAFO exists if it is (1) a "large" AFO (with over 1000 animal units) or (2) a "medium-sized" AFO (between 300 and 999 animal units that has a "direct discharge through a manmade conveyance" to waters of the United States or through which waters of the United States pass). Finally, if the owner or operator of a CAFO does not cause an addition of manure to waters of the United States, that CAFO would not need a permit. Permits are required only to authorize the discharge of pollutants from a CAFO. Some CAFOs that do not discharge nonetheless do obtain permits as to provide a "permit shield" in the event of unanticipated, protracted storm events.

PERCEPTION #2. Permitting authority has now been extended for federal and state regulators to all aspects of manure handling, including operation of vehicles.

REALITY: Permitting authority under the Clean Water Act does not extend to operation of vehicles or any other aspect of manure handling unrelated to the "addition of pollutants from a point source to waters of the United States." Under the Clean Water Act, a CAFO is

specifically defined as a "point source" and thus discharges from such operations are subject to CWA permit regulation. Most other farming operations would not be "point sources" within the meaning of the CWA under the agricultural storm water discharge exemption. Even manure discharges from CAFOs may qualify for the agricultural storm water exemption, but that was not the case with Southview Farm.

The court in *Southview Farm* said that the issue in determining whether the exemption applies is whether discharges are the result of precipitation, and not whether discharges occur during the rainfall or mix with rain water runoff. Testimony was presented to the jury to indicate that Southview Farm spread manure in anticipation of rain to take advantage of the exemption. Though discharges occurred during rainfall events, the discharges were not the result of precipitation but rather the over-saturation of the fields with manure.

PERCEPTION #3. The definition of CAFO has now been expanded beyond EPA's historic program and regulations.

REALITY: The interpretation of the vegetation criterion is not an expansion of historic interpretations of the point source permit program for CAFOs. As the amicus brief explained, the explanation of the vegetation criterion was based on the administrative record supporting the CAFO regulations published in 1974. EPA recognizes that not all States administering approved point source permit

programs interpret the CAFO regulations in a consistent manner. The relative complexity of the CAFO regulation itself has resulted in inconsistent State reporting of sources of water quality impacts pursuant to CWA section 305(b). To remedy what EPA perceived to be inconsistent interpretations of the CAFO regulations nationwide, in 1991, EPA convened a workgroup of EPA Regions and approved States to develop a guidance manual on interpretation of the regulation. EPA met with feedlot/producer groups to seek out review and comment. Explanations of the regulations in the amicus brief are consistent with the draft guidance manual.

PERCEPTION #4. All farmers may be subject to citizen suits for discharges without a permit for runoff from fields where manure was spread.

REALITY: Only owners and operators of unpermitted concentrated animal feeding operations may be subject to citizen suits, where there are discharges from the CAFO to navigable waters, not all farmers. Moreover, only owners and operators of "large" feedlots may be subject to citizen suits for "runoff," or sheet flow from fields. "Medium-sized" feedlots will not be subject to citizen suits for "runoff" because such feedlots are not concentrated animal feeding operations unless (1) the "runoff" is to waters of the United States that pass through the area of animal confinement or (2) the feedlot discharges "directly" to waters of the United States through a manmade conveyance.

PERCEPTION #5. All manure spreaders are point sources.

REALITY: Manure spreading operations are not necessarily point sources under the Clean Water Act. As explained previously, CAFOs are the only feedlots subject to regulation under the point source permit program. If a feedlot is not a CAFO, it is not a point source. In the *Southview Farm* case, the Circuit Court agreed with the citizen plaintiffs' alternative argument that, "manure spreading vehicles themselves were point sources. The collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point sources under the case law." *Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994). EPA does not endorse this interpretation and believes it was unnecessary for the Court to reach this point because Southview Farm operated a "large" CAFO. As a large CAFO, the means of conveyance (i.e., manure spreading vehicles) was irrelevant for determining whether there was a point source discharge.

If Southview Farm had been a medium-sized CAFO, the means of conveyance would be relevant because a medium-sized AFO is not a CAFO unless the discharge is through a manmade conveyance or the discharge occurs directly into waters of the United States passing through the area of animal confinement. If neither of those two means of conveyance criteria were met, a medium-sized AFO would not be a CAFO unless designated by the

permitting authority after an on-site inspection. Therefore, the existence of manure spreading devices as a medium-sized AFO is relevant to determine whether it is a CAFO. For small AFOs, to be a point source, the feedlot would need to both (1) discharge through a manmade device (e.g., use manure spreaders) and (2) be designated as a CAFO by the permitting authority. Thus, extending the *Southview Farm* Court's reasoning to medium-sized and small AFOs is misplaced. The Court's "alternative" holding on this point was *dicta*. *REALITY:* All manure spreaders are not necessarily point sources. In the Southview case, the Circuit Court stated that the manure-spreading devices used on Southview property were point sources. However, in this particular case because the number of animals met the size requirement of a large CAFO (an AFO with over 1000 animal units), this point was dicta. This means that the discussion of whether the manure spreader was a point source was irrelevant in the case because Southview was determined to be a point source, a CAFO.

U.S. ENVIRONMENTAL PROTECTION AGENCY
Office of Water
Washington, D.C. 20460

PERCEPTIONS ABOUT EPA'S ACTIONS IN THE SOUTHVIEW FARM CASE

December 12, 1994

PERCEPTION #1. EPA intends to broaden its regulatory control over farmers, as evidenced by the filing of the amicus brief in Southview Farm case.

REALITY: The United States filed the amicus brief in the *Southview Farm* case to correct the District Court's legal interpretation of existing EPA regulations. The District Court below had concluded that Southview Farm was not an AFO based on the vegetation criterion described previously. The District Court held that, because Southview Farm grew crops in fields adjacent to the feedlot, the feedlot was not an AFO. In the amicus brief, EPA explained that the Agency interpreted the vegetation criterion differently -- that only vegetation in the lot or facility where animals are stabled/confined and fed/maintained should be considered to determine whether a feedlot is an AFO. To conclude otherwise would render the definition of CAFO meaningless because it disregards "concentration" of animals. EPA presumes that most, if not all, feedlots have some vegetation nearby.

EPA did not intend to broaden regulatory controls, but merely to clarify that a "large" feedlot was, according to existing regulations, a concentrated animal feeding operation. If uncorrected, the legal position announced in the District Court below would have effectively eliminated all existing regulatory controls over operations clearly intended to be subject to CWA permitting by Congress.

In the amicus brief, EPA also attempted to explain the "agricultural storm water discharge" exemption. EPA argued that even "large" CAFOs would not be subject to the CWA point source program if, for instance, a CAFO spread manure on agricultural fields consistent with accepted agricultural practices (e.g., not at rates in excess of normal agronomic rates, not when the ground is over-saturated, etc.). EPA did argue that not all additions of pollutants from an agricultural field would be exempt, so that agricultural fields would not provide a "nonpoint haven" where any other industrial point source discharger could evade the CWA through land application of industrial wastes. The Court did not incorporate EPA's interpretation of the exemption because the Southview Farm matter did not involve such facts.

PERCEPTION #2. EPA intends to encourage citizens to sue farmers for manure spreading and offers no protection if they do sue.

REALITY: EPA has no intention of encouraging CWA citizen suits against farmers for manure spreading. EPA

recognizes that manure spreading in and of itself is a routine, accepted agricultural practice which accomplishes two beneficial goals; removal and distribution (usually upon cropland) from the animal confinement area and increased fertility of cultivated land. EPA's regulation of CAFOs under the point source (NPDES) program is concerned only with the proper collection, retention, storage, handling, and disposal of animal wastes by CAFOs, and not all farmers generally.

PERCEPTION #3. EPA regulators give no credit to farmers for the practices they adopt voluntarily.

REALITY: As explained below, the United States argued in the amicus brief that the "agricultural storm water discharge" exemption could be interpreted to exclude from the point source permitting program storm water discharges from manure spreading according to accepted agricultural practices. The Court did not accept EPA's interpretation because, as the jury found, the facts in Southview Farm did not present the opportunity to apply such an interpretation.

EPA, in partnership with USDA and Conservation Districts, has a long history of support to farmers, both in technical assistance and outreach and financial aid in grants and pass-through funding from the federal to the State and local level for development of best management practices (BMPs) and local demonstration projects in agricultural water use efficiency. Some examples include

(1) the CWA section 319 grants EPA provides to States to implement State nonpoint source management programs, which are frequently voluntary and incentive-based and (2) the Farm-A-Syst program, which encourage self-evaluation or "reality checking" for farmers in assessing the economy and efficiency of their farming practices.

In supporting these endeavors, EPA recognizes that most BMPs are a direct result of common sense on the part of the farmer, and are employed because the return on the investment of time and resources usually presents a better than "break-even" advantage. EPA has provided over 371 million dollars ($371M) to states from fiscal years 1990 through 1995 - most funding goes to agricultural activities.

(8)

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IN THE

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On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF AMICUS CURIAE NATIONAL COUNCIL OF FARMER COOPERATIVES AND NATIONAL CATTLEMEN'S ASSOCIATION IN SUPPORT OF PETITION

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INTEREST OF AMICUS CURIAE NATIONAL COUNCIL OF FARMER COOPERATIVES AND NATIONAL CATTLEMEN'S ASSOCIATION

The National Council of Farmer Cooperatives (hereinafter referred to as "NCFC") is a nationwide association of cooperative businesses owned and controlled by farmers. Its membership includes nearly 100 major marketing and farm supply cooperatives, the banks of the Farm Credit System, and 31 state councils of farmer cooperatives.

NCFC's members handle practically every type of agricultural commodity produced in the United States. They market

these commodities domestically and around the world, and furnish supplies and credit to their farmer members and patrons. NCFC represents about 90% of the nearly 4,300 local farmer cooperatives throughout the nation. Those cooperatives have a combined membership of nearly 2,000,000 farmers and ranchers.

Cooperatives supply about 40 percent of the production inputs, including plant nutrients and crop protection products, used on farms in the U.S. Over three-fourths of the milk produced by America's dairy farmers is processed and marketed through farmer-owned cooperatives. Southview Farm is a member of Agway, Inc., a regional farm supply cooperative, and of Dairylea Cooperative, Inc., a dairy cooperative. Agway is a member of NCFC.

The National Cattlemen's Association (hereinafter referred to as "NCA") is the national spokesman for all segments of the nation's beef cattle industry. NCA represents 230,000 cattle producers nationwide through 46 state cattlemen's and 28 national breed associations. NCA's mission is to advance the economic, political, and social interests of the U.S. cattle industry.

Agriculture is the nation's largest industry. The beef cattle business, accounting for approximately 22% of all agricultural marketings and 44% of all livestock and poultry marketing (both based on total annual cash receipts), is the largest segment of American agriculture.

The interest of NCFC/NCA in this case is to urge the Court to review the Second Circuit's decision in light of the intent of Congress in enacting the Clean Water Act (hereinafter referred to as "CWA"). 33 U.S.C 1251 *et seq*. The farmer-owners of NCFC member cooperatives and the members of NCA could face adverse legal and economic consequences if the Second Circuit's decision is allowed to stand. Everyday farming activities such as the application of fertilizers and pesticides, and soil

disturbing activities including tilling, planting and cultivating may be considered point source discharges as a result of the lower court's holding in this case. This could subject virtually every farmer in the United States to the CWA's restrictive regulation and permit requirements, as well as citizen suits, and create a regulatory morass for state and federal regulators.

SUMMARY OF ARGUMENT

The primary purpose of this submission is to support the petition for writ of certiorari by outlining the practical ramifications of the Second Circuit's decision. NCFC/NCA agree with the petitioners' contention that the Second Circuit went beyond Congressional intent in interpreting the CWA, especially with regard to (1) the "agricultural stormwater exemption," and (2) the definition of manure spreaders and "swales" in crop fields as point sources. 33 U.S.C.§ 1362(14).

By its very nature, farming involves the purposeful disturbance of land and the application of crop nutrient and protection products. Congress took this into account in the CWA by distinguishing between point source discharges and nonpoint source run-off from agricultural land. The Second Circuit's decision blurs this statutory distinction and could render meaningless the CWA's nonpoint source agricultural provisions in Section 319. 33 U.S.C. 1329. The lower court's holding could threaten the economic viability of every farmer and rancher in the United States by subjecting them to the restrictions of the CWA's point source regulations and citizen suit provisions. In addition, the Second Circuit's holding would significantly increase the responsibilities of state regulators.

ARGUMENT

I. CONGRESS RECOGNIZED AND PROVIDED FOR THE UNIQUE NATURE OF AGRICULTURE IN THE CWA.

A. The Special Treatment Of Agriculture In The CWA Is Necessary And Appropriate.

Agriculture involves the purposeful disturbance of land surfaces and the application of crop nutrients and protection products to augment and enhance natural processes in the production of food and fiber. Society has enjoyed the benefits of American agriculture's bountiful harvest in the form of an uninterrupted supply of high quality and affordable food and fiber.

Regardless of their best efforts, farmers and ranchers can not completely control runoff from their land caused by rainfall. Consequently, runoff may transport soil, pesticides, and nutrients (including animal manures and crop residues) into waters under the jurisdiction of the CWA. Because of the influence of natural forces, effective nonpoint source management involves the daily decisions of nearly two million farmers and ranchers on a site-specific basis. In fact, it is typically very difficult to trace nonpoint source runoff to its origins by the time it enters waterways protected by the CWA. There are simply too many variables involved in agriculture to regulate it in a manner similar to discharges from manufacturing operations and other point source activities.

B. The CWA Takes Into Account The Unique Nature Of Agricultural Production By Distinguishing Between Point Source Discharges And Nonpoint Source Runoff.

Congress accommodated the unique nature of agricultural production in the CWA by distinguishing between point source

discharges and nonpoint source runoff. The CWA contains distinct provisions for each category of pollution.

Point sources, with measurable discharges through readily identifiable pipes or other conveyances, are highly regulated through Section 301 of the National Pollution Discharge Elimination System (hereinafter referred to as "NPDES") permits and enforcement mechanisms, including citizen suits. 33 U.S.C. 1342.

Congress further acted to differentiate among nonpoint source activities in the CWA by:

> Establishing voluntary nonpoint source management programs under Section 319, in which States take the lead in determining appropriate programs for managing categories of nonpoint sources, including agricultural land activities. 33 U.S.C. 1329;
>
> Requiring permits for municipal and industrial stormwater runoff from parking lots and the like in Section 402. 33 U.S.C. 1342.; and
>
> Clarifying the authority of States to manage agricultural land activities under Section 319, by specifically exempting "agricultural stormwater" discharges from the point source provisions of the CWA.
> *Id.*

Under Section 319, Congress allows States to determine how best to work with farmers and ranchers to manage nonpoint source runoff. States have generally focused efforts where waters are deemed by the State to not comply with designated uses. Progress by farmers and ranchers is judged by their participation in implementation of best management practices that are intended to reduce runoff, not by the actual levels of runoff. Significantly, Section 319 does not provide for citizen suits. 33 U.S.C. 1329.

II. THE SECOND CIRCUIT'S DECISION BLURS THE STATUTORY DISTINCTION BETWEEN POINT SOURCE DISCHARGE AND NONPOINT SOURCE RUNOFF.

A. The CWA Establishes Separate Regulatory Regimes For Agricultural Land Application And Concentrated Animal Feeding Manure Storage Facilities.

Before the Second Circuit's decision, only one agricultural production activity, concentrated animal feeding operations (hereinafter referred to as "CAFO"), was subject to the point source regulatory regime and citizen suits. 33 U.S.C. 1362(14). CAFO's are held to a higher standard than other point sources. The NPDES permits for most point sources include allowable legal discharges of pollutants into navigable waters. In contrast, CAFO's are permitted no discharge from animal manure lagoons or other storage structures, except in the event of a 25-year, 24-hour storm.

In its last minute amicus to the Second Circuit, the U.S. Department of Justice (hereinafter referred to as "DOJ") argued that Southview Farm's confinement operation constituted a CAFO. DOJ further argued that subsequent land application of manure constituted a discharge from the CAFO.

Whether Southview Farms should be regulated as a CAFO misses the point. Even if Southview Farms was a CAFO, this case does not involve a discharge from a manure lagoon, a fact that was clearly established in the District Court. This case involves runoff from manure land application. Prior to the Second Circuit's decision, land application of manure was not subject to the point source permitting requirements of CAFO's. Instead, it was managed as a nonpoint source activity under Section 319. 33 U.S.C. 1329. Congress intended runoff from manure spreading and other types of land application to be

considered as nonpoint sourced and intended the strict point source regulation of CAFO's to be narrowly applied.

B. The Lower Court's Decision Could Render Section 319 Of The CWA Meaningless.

The Second Circuit's determination that manure spreaders and field swales constitute point sources is contrary to the tradition of managing agricultural activities under the nonpoint source provisions of Section 319 and could render that provision meaningless. 33 U.S.C. 1329. Under the Second Circuit's reasoning it would appear that each of the following major farming practices could also be considered point source activities:

Application of agricultural inputs, such as plant nutrients and pesticides;

Land application of treated municipal sewage sludge; and

Potentially any soil disturbing activity (tillage, cultivation, planting, etc.).

Like the case before the Court, each of these examples involves the use of machinery or conveyance to spread concentrated materials on the land or making the land more susceptible to runoff in the event of rainfall. Further, of the more than 300 million acres of cropland and 635 million acres of pasture and rangeland, there are literally millions of "swales," or low spots that could be deemed by a court to be point sources. Few farms or ranches are so level there are no "swales."

III. SUBJECTING AGRICULTURAL LAND APPLICATION TO POINT SOURCE PERMITTING AND CITIZEN SUITS WOULD RESULT IN A REGULATORY AND LEGAL MORASS FOR FARMERS AND RANCHERS AS WELL AS THE GOVERNMENT.

Every farm in the U.S. regularly engages in one or more of the above practices which could be considered point source activities if the Second Circuit's decision is allowed to stand. Practically, this means every farm and ranch in the U.S. could be subject to point source regulations and citizen suits for their farming and ranching activities.

Additionally, private citizens may use the Second Circuit's decision to bring citizen suits against farmers and ranchers. This is arguably the most egregious manifestation of the Second Circuit's holding. A farmer using the best management practices available to control runoff could be subject to citizen suits. Even if the farmer won such a suit, the cost of litigation could be devastating.

Even the U.S. Environmental Protection Agency (hereinafter referred to as "EPA") disagrees with the Second Circuit's ruling that land application equipment constitutes a point source. EPA has indicated that the federal government does not intend to require NPDES permits for manure spreaders. However, it is States who are responsible for most permitting programs and must struggle with how to comply with the Second Circuit decision.

As a prime example of unintended consequences of the lower court's decision, the U.S. Department of Agriculture has policies and programs to encourage farmers and ranchers to manage animal manure as a nutrient and soil building resource, instead of as a waste product. EPA is also actively encouraging farmers to use municipal sewage sludge as a nutrient, thereby helping to alleviate a growing waste problem. These efforts will

be thwarted if farmers and ranchers become more vulnerable to CWA citizen suits.

CONCLUSION

The petition for a writ of certiorari should be granted. This case should be reviewed in light of the intent of Congress in enacting the CWA. The decision of the Second Circuit should be reversed.

Respectfully Submitted,

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No. 94-1316

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BRIEF *AMICI CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND THE NEW YORK FARM BUREAU, INC. IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND THE NEW YORK FARM BUREAU, INC. IN SUPPORT OF PETITIONER

With the written consent of all parties given and filed with the Clerk of the Court, the American Farm Bureau Federation and the New York Farm Bureau, Inc., respectfully submit this brief as *amici curiae*.

Amici curiae, the American Farm Bureau Federation and the New York Farm Bureau, Inc., pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTEREST OF *AMICI CURIAE*

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919

and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois and has its principal offices in Park Ridge, Illinois. AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in 50 states and Puerto Rico (including the New York Farm Bureau, Inc.) and represents more than 4 million member families. AFBF farm and ranch members produce virtually every kind of agricultural commodity produced commercially in the United States.

The New York Farm Bureau, Inc. (NYFB) is a non-governmental, voluntary farm organization. It is a not-for-profit corporation which was originally organized under the "Membership Corporation Law" of New York State in 1953. NYFB's purpose is to promote, protect and represent the economic, social and educational interests of New York farmers, as well as to encourage the development and preservation of agricultural areas within the state. NYFB has a statewide membership of more than 25,000 member families in 50 counties including Wyoming County wherein the land and farming activities of this case are situated.

The American Farm Bureau Federation and the New York Farm Bureau, Inc. (hereinafter collectively referred to as "Farm Bureau") and their members have a vital interest in this case. The Court of Appeals for the Second Circuit has overridden clear Congressional intent and rewritten the Clean Water Act (CWA) so as to regulate agricultural activities as point sources rather than non-point sources of pollution. The Circuit Court expanded the scope of what constitutes a concentrated animal feeding operation as a regulated point source far beyond that intended by Congress. The Circuit Court disregarded the clear intent of Congress that, except for concentrated animal feeding operations, all other agricultural activities are to be regulated under the CWA

as non-point sources. The Circuit Court has even gone so far as to make farm machinery and implements themselves into point sources of pollution, and made the application of manure to land to fertilize crops growing thereon a point source discharge to waters of the United States.

If allowed to stand, the Circuit Court's decision will have a devastating impact on virtually every farmer and rancher in America through the imposition of an unintended, unnecessary and extremely costly industrial-type regulatory compliance burden involving additional restrictive and uneconomical farm and ranch operating practices. Under the reach of the Circuit Court's decision farmers and ranchers will have to seek federal permits for usual and customary farming activities, including the application of manure to farm fields and crop lands as fertilizer. The Circuit Court's decision is even broad enough to encompass the application of any and all fertilizers, pesticides and herbicides to agricultural fields and crop lands. The Circuit Court's decision also opens the federal courts to a myriad of CWA citizen suit actions against farmers and ranchers by individuals whose real complaints are with the usual and customary farm smells and odors that exist in the rural areas where such individuals have chosen to reside.

STATEMENT OF THE CASE

Petitioners are a dairy farm and its manager (hereinafter collectively referred to as "Southview Farm"). Southview Farm's dairy operation is located in Wyoming County, New York, and includes approximately 1,290 milking cows and 900 calves and heifers. Southview Farm's operation involves a manure collection, separation and storage system that allows Southview Farm to recycle organic nutrients through the application and spreading of manure as fertilizer on some 1,900 acres of attendant crop lands growing forage and feed for Southview Farm's dairy animals.

This case was initiated by the Respondents, a group of rural residents, in federal court through the filing of a citizen's suit under the CWA. Respondents' complaint alleged violations of the CWA and also contained state law causes of negligence, nuisance and trespass. The CWA allegations complained of manure leakage from Southview Farm's storage lagoon to surface and groundwater, and that manure applied by Southview Farm to its crop lands accumulated and ran in discrete rivulets into drainage ditches that drained into adjacent surface waters. Respondents did not allege that the Southview Farm's dairy farm was a concentrated animal feeding operation under the CWA.

Southview Farm moved unsuccessfully to dismiss Respondents' complaint and subsequently for summary judgment on grounds that Respondents failed to allege and could not show activities that constituted an illegal discharge of a pollutant from a point source into waters of the United States, all essential to the maintenance of a citizen's suit under the CWA. Southview Farm contended that their operations were a non-point source of pollution and as such not subject to a citizen's suit enforcement action. In denying Southview Farm's motions the trial court utilized a broad interpretation of what constituted a point source, relying primarily on case authority involving the channeling or collecting of surface runoff into discrete rivulets from industrial activities such as mining, and not involving agricultural activities.

The case was tried to a jury which found for Respondents on five of eleven alleged CWA discharge violations. However, the trial court, on Southview Farm's motion, overturned the jury verdict on the CWA violations. Respondents appealed to the Second Circuit Court of Appeals.

The trial court had ruled prior to the submission of the case to the jury that Southview Farm was not a con-

centrated animal feeding operation because Southview Farm grew crops on its dairy farm lands. Respondents did not appeal that ruling to the Circuit Court. Because it was not raised on appeal by the Respondents, neither Southview Farm nor Farm Bureau (which participated as *amici* before both the trial court and the appellate court) addressed the concentrated animal feeding operation issue before the Circuit Court.

Four days prior to oral arguments, the United States Environmental Protection Agency (EPA) through the Department of Justice filed an out-of-time *amicus* brief with the Circuit Court which was accepted over the objection of Southview Farm. The Circuit Court further refused to grant Southview Farm a continuance and permission to file a response to the new arguments raised by EPA relative to Southview Farm's dairy activities constituting a concentrated animal feeding operation.

The Circuit Court thereafter issued its decision which substantially adopted the position and reasoning contained in EPA's out-of-time *amicus* brief. The Circuit Court held that, because Southview Farm's operation involved more than 700 dairy animals and it did not grow crops within the area in which the animals were confined, it was a facility defined in EPA's regulations under the CWA as a concentrated animal feeding operation. The Circuit Court also held that Southview Farm's application of manure to its crop fields was a point source discharge when the manure accumulated or was picked-up in stormwater run-off and was channeled in discrete rivulets to surface waters. And, finally, the Circuit Court held that manure spreading equipment and vehicles themselves to be point sources under the CWA.

REASONS FOR GRANTING THE WRIT

The case now comes before this Court on petition for certiorari which *amici curiae*, the American Farm Bureau Federation and the New York Farm Bureau, Inc., strongly support and urge this Court to grant. The Circuit Court has seriously misconstrued the CWA and its regulation of agricultural activities. It has overturned the intent of Congress that, except for the singular activity of a concentrated animal feeding operation, agricultural activities are to be regulated as non-point sources, not as point sources.

The Circuit Court has rewritten the CWA such that every farmer and rancher in America that maintains any number of animals in a confined area can be regulated as a concentrated animal feeding operation; that every mechanical manure, fertilizer, pesticide, and herbicide applicator used by every farmer and rancher in America will be regulated as a point souce under the CWA, and that the application of manure, commercial fertilizers, pesticides, and herbicides to crop lands will be illegal discharges of a pollutant under the CWA if they find their way into any surface waters through a discrete entry point.

Virtually every farmer and rancher in the United States is affected by the Circuit Court's decision and is vitally concerned with this Court accepting this case for review and ultimately restoring Congress' intent for the regulation of agriculture as a non-point source under the CWA.

I. EXCEPT FOR CONCENTRATED ANIMAL FEEDING OPERATIONS, CONGRESS CLEARLY INTENDED THAT ALL OTHER AGRICULTURAL ACTIVITIES BE REGULATED AS NON-POINT SOURCES UNDER THE CWA

The CWA had it's origin in the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-

500, 86 Stat. 816, 33 U.S.C. § 1251 *et seq.* This lengthy and complicated Act represented the first serious attempt to address the nation's water pollution problems by focusing on "point source" pollution. To address point source pollution, the 1972 Amendments established the National Pollution Discharge Elimination System (NPDES) which applied effluent limitations through a federally mandated and supervised permit system. Pub. L. No. 92-500, § 403, 86 Stat. 816, 880, codified as amended at 33 U.S.C. § 1342.

"Non-point sources," on the other hand, were addressed by Congress through the Section 208 planning process which placed primary responsibility on the states. Pub. L. 92-500, § 208, 86 Stat. 816, 839, codified as amended at 33 U.S.C. § 1288. The exemption of non-point sources from the NPDES permit system was not the result of a failure to appreciate the problem on the part of the Congress or to exclude it from regulation under the CWA. To the contrary, Congress recognized that controlling non-point sources, particularly agricultural activities, was required to achieve its water quality goals.

Congress gave careful attention to agricultural activities when enacting the Federal Water Pollution Control Act. But for the singular exception of a concentrated animal feeding operation which was expressly included within the definition of a point source, Congress chose to address the problem of agricultural pollution under the non-point source control provisions of Section 208. Pub. L. No. 92-500, § 208(b)(2)(f), 86 Stat. 816, 841, codified as amended at 33 U.S.C. § 1288(b)(2)(f). The problem's magnitude, in terms of the number and variety of sources, the site specific nature of such sources, the lack of known control technologies, and the perception that many non-point problems could be addressed only through land use controls, a traditional state role, required an approach different from that given point sources under the NPDES. As Senator Bob Dole indi-

cated in his supplemental views in the Senate Report accompanying the 1972 Amendments, "A major new thrust of this bill is in the field of agricultural pollution . . . . The bill would amend the Federal Pollution Control Act to place responsibility on the states for instituting and expanding the control of water pollution related to agriculture." *See* S. Rep. No. 414, 92d Cong., 1st Sess. 39, Supplemental Views of Senator Bob Dole, *reprinted in* 1972 U.S.C.C.A.N. at 3759.

Congress has revisited and revised the Federal Water Pollution Control Act Amendments several times since 1972, including renaming it as the "Clean Water Act" in 1977. Pub. L. 95-217, sec. 2, § 518, 91 Stat. 1566. For the most part, however, the basic 1972 framework remains in place and the fact that Congress intended to continue regulating agricultural activities as non-point sources under Section 208 is evidenced by the specific revisions made in direct response to subsequent court interpretations that ran contrary to such intent. Most revealing is the revision made amending the point source definition in 1977 to exclude "return flows from irrigated agriculture." Pub. L. No. 95-217, § 33(b), 91 Stat. 1577, codified at 33 U.S.C. § 1362(14). This revision was made to override *Natural Resources Defense Council v. Train*, 393 F. Supp. 1393 (D.D.C. 1975), *aff'd sub nom.*, and *Natural Resources Defense Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), where permit requirements under Section 402 of the CWA were held to apply to return flows from irrigated agriculture in spite of the fact that section 208(b)(f) provided for state control plans that included a process to (i) identify, if appropriate, agriculturally and silviculturally related non-point sources of pollution, including return flows from irrigated agriculture.

In responding to these court decisions with rectifying legislation, Congress made a very clear statement as to what its intent was and is for agriculture under the CWA:

> Testimony in field hearings suggested that effluent limitations based on technological methods may not be appropriate for control of return flow pollutants and the committee determined that *these sources were practically indistinguishable from any other agricultural runoff, which may or may not involve a similar discrete point of entry into a water-course. All such sources, regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F).* (Emphasis added)

S. Rep. No. 95-370, 95th Cong., 1st Sess. 35, *reprinted in* 1977 U.S.C.C.A.N. at 4360.

This same non-point intent was the basis upon which Congress added the express exclusion for "agricultural stormwater discharges" from the point source definition when the CWA was amended in 1987 to provide for the comprehensive regulation of certain forms of industrial and municipal stormwater runoff. Pub. L. No. 100-4, § 503, 101 Stat. 75, codified at 33 U.S.C. § 1362(14). Congress so acted to preclude any possible misconstruction that agriculture was to be included in the municipal and industrial stormwater control program.

II. THE APPLICATION OF MANURE TO FARM LANDS THROUGH HUMAN ACTIVITY IS NOT A POINT SOURCE DISCHARGE EVEN THOUGH IT ACCUMULATES AS RUN-OFF IN NATURAL OR ARTIFICIAL CONVEYANCES AND IS CHANNELED TO AND ENTERS SURFACE WATERS AT A DISCRETE POINT

Noting that the definition of a point source under the CWA is to be broadly interpreted, the Circuit Court held that manure applied by Southview Farm to its farm lands and thereafter collected and channeled to surface waters constituted a discharge by a point source. Expanded to

its broadest extent, the Circuit Court's decision is equally applicable to the application of any fertilizer, pesticide or herbicide to agricultural lands if they collect in run-off that becomes channeled and enters surface waters through a discrete point.

The Circuit Court supported its interpretation of the CWA with authorities that involved or relied upon cases that involved activities other than agriculture, primarily mining activities. As indicated by the foregoing discussion of the special consideration and treatment accorded agriculture by Congress in enacting and amending the CWA, decisions involving the interpretation and application of the law in mining and industrial pollution cases are not applicable to agricultural activities.

In any event, the Circuit Court's broad point source interpretation ignores the clear expression of contrary intent when it overrode the court decisions holding agricultural irrigation return flows to be point sources. As Congress clearly indicated, such flows were indistinguishable from any other agricultural runoff which may or may not involve a discrete point of entry into a water course. All such agricultural sources regardless of the manner in which applied to the agricultural lands, and regardless of the discrete nature of the entry point, are to be treated and regulated under the CWA as non-point sources.

III. MANURE SPREADING VEHICLES AND EQUIPMENT ARE NOT THEMSELVES POINT SOURCES UNDER THE CWA

Relying primarily again on case authorities that involved activities other than agriculture, the Circuit Court held manure spreading vehicles are themselves point sources. The cases relied on by the Circuit Court for this decision involved the role of vehicles and equipment in the dredging and filling of wetlands under Section 404 of the CWA. 33 U.S.C. § 1344(a). Not only are such

cases inappropriate to assess the role of vehicles and equipment used in the conduct of normal farming practices, but the Circuit Court has stretched the defintion of a point source beyond its endurable limits. In the case of Southview Farm, such equipment only applied manure to farm fields and crop lands. It was later, through natural collection and channeling, that the applied manure reached any surface waters. If anything, vehicles and equipment that apply manure and other farm chemicals to agricultural crop lands and fields are instruments of non-point pollution.

IV. FARMS LIKE SOUTHVIEW FARM ARE NOT CONCENTRATED ANIMAL FEEDING OPERATIONS UNDER THE CWA

The CWA, while generally treating agriculturally related pollution as nonpoint source pollution under Section 208, does specifically treat pollution from "concentrated animal feeding operations" as point sources. The term "concentrated animal feeding operation" is not defined under the CWA, but is found in EPA's implementing regulations, at 40 C.F.R. § 122.23(b)(3), as follows:

> "Concentrated animal feeding operation" means an "animals feeding operation" which meets the criteria in Appendix B of this part, or which the Director designates under paragraph (c) of this section (40 C.F.R. § 122.23(b)).

The structure of this definition requires that in order to be a "concentrated animal feeding operation", the facility must first be an "animal feeding operation". The term "animal feeding operation" is defined at 40 C.F.R. § 122.23(b)(1), which reads as follows:

> "Animal feeding operation" means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:
>
> > (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and

> fed or maintained for a total of 45 days or more in any 12 month period and
>
> (ii) crops, vegetation forage growth, or post harvest residues *are not sustained* in the normal growing season *over any portion* of the lot or facility. (emphasis added)

It is clear from the structure and criteria of the definitions of "concentrated animal feeding operation" (CAFO) and "animal feeding operation" (AFO), that these terms were intended to apply to the specific situation of a "feeding" operation where animals are brought together in a facility which consists *only* of a "confined area"; where the facility does *not* include actual "farm acreage" where crops are grown and where other normal farming activities are conducted; and where the facility is *not* a "farming operation" at all. The most obvious example of an AFO or CAFO facility as intended by Congress is a cattle-fattening feedlot, where animals are simply held for feeding and fattening prior to slaughter. In that situation, the facility consists of a feedlot only, with no attendant farming operation or farm acreage for the raising of crops for those animals, and where all feed inputs are brought to the facility from outside sources.

The present case is very different from the cattle fattening feedlot scenario, and represents a situation which Congress did not intend to be considered a "CAFO". Southview Farm is *not* a feedlot or a feeding operation. Southview Farm is, as its name implies, a "farm". Southview Farm's animals are not brought there temporarily for the purpose of confined feeding and fattening, but are instead there as an integral part of the overall farm operation. Being a dairy farm, the ultimate purpose or goal of the activity is the production of milk. However, the overall farming operation at Southview Farm, and at thousands of other similar dairy farms throughout the country, is much broader and includes, for example, extensive crop production. In contrast to the "no crops or

forage sustained on the premises" requirement, Southview Farm's operation includes over 2,000 acres of land, both owned and rented, where an immense volume of crops and forage is cultivated, specifically for the purpose of sustaining the dairy cows at Southview Farm.

Since the definition of "animal feeding operation" under the CAFO regulations uses the word "and" rather than "or", both the conditions of (i) and (ii) above must be satisfied in order for a facility to meet the definition of an "animal feeding operation". Southview Farm cannot be considered an "animal feeding operation", since it does not meet condition (ii) above. In contrast to condition (ii) of that definition, which requires that "crops, vegetation forage growth, or post-harvest residues are *not sustained* in the normal growing season over *any portion* of the lot or facility", Southview Farm grows or produces a vast quantity of the forage and feed for its animals directly on the acreage of the farm operation. The total projected volume of crops and forage produced on the farm property for the 1992 crop year was 25,000 tons. That amount was produced on a total of approximately 1,900 tillable acres of the total 2,200 acres of Southview's farm operation, and consisted of corn silage, alfalfa, clover and grasses.

Due to the large volume of crops and forage sustained on the farm during the normal growing season, and covering almost 90% of total farm acreage, Southview Farm clearly does not meet the definition of an "animal feeding operation", and by law cannot be held to be such an operation. Since Southview Farm cannot be considered an "animal feeding operation", and since by definition a facility must be an "animal feeding operation" in order to meet the definition of "concentrated animal feeding operation", Southview Farm, by definition and by law, *cannot* be considered a "concentrated animal feeding operation" point source under the CWA.

The Circuit Court, however, adopted the view that for the "crops/forage exception" to apply, and thereby remove the farm from the CAFO category, the crops or vegetation must be grown *within* the facility. Specifically, the Circuit Court held that "a lot or facility is an AFO when it confines and maintains animals on a lot which does not contain vegetation in the normal growing season. The vegetation criterion applies to the lot or facility *in which* the animals are confined".

The Circuit Court has grossly misconstrued the meaning and intent of this CWA regulatory language and rendered it nonsensable. This language simply cannot mean that crops must be grown *inside* the confinement facility or feeding area. Crops or forage for large numbers of animals are never grown inside the actual structure where the animals are housed or fed. Crops for farm operations are always grown outside of the barn or place of confinement in open fields. Congress would never have intended an interpretation of the CWA which makes no common sense, or which has no practical meaning or application in the real world, or to those Congress intended to regulate. Clearly, Congress intended to except those farms where even though there may be more than seven hundred dairy animals, crops are grown over some portion of the lot or facility on which a barn or place of confinement exists.

Furthermore, the Circuit Court's interpretation is not supported by the specific language of the AFO definition, which simply does not say the vegetation or growth must be grown *within* the facility. First, the AFO definition states that an "animal feeding operation" means a lot or facility "*where* the following conditions are met". The language does not say, for instance, "within which the following conditions are met". The word "where" is much broader than a restrictive phrase such as "within which". Secondly, in part (ii) of the definition, the words *"over any portion of"* the lot or facility are used. Again,

the fact that such broad language is used works against the restrictive interpretation adopted by the Circuit Court, that the crops or forage must be grown "within" a feedlot facility in order to be removed from the CAFO category. Farm Bureau submits that the use of the terms "where" rather than "within", and the phrase "over any portion of" rather than "within", makes it very clear that the Circuit Court's interpretation of these terms is erroneous.

The Circuit Court also placed heavy emphasis on the fact that the daiy animals at Southview Farm are not pastured. The Circuit Court's focus and emphasis on whether the animals are pastured is misplaced. There is nothing in the CWA regulatory language or Congressional intent that even remotely or indirectly refers to whether or not the animals are pastured. Pasturing is simply not a factor that Congress intended regulators or courts to utilize in determining whether or not a farm operation is a CAFO.

In addition, the Court's emphasis on the pasturing issue leads to a direct conflict with the position adopted by the Circuit Court in regard to the "crops/forage exception" within the regulatory definition of an AFO. As previously indicated, the Circuit Court interpreted that language to mean that the crops must be actually grown *inside* the facility in order to remove an operation from the CAFO category. The Circuit Court's repeated emphasis on the fact that Southview Farm's cows are not pastured implies that if the cows had been pastured, they would have been "confined" in an area which sustains "vegetation forage growth", and Southview Farm would then have satisfied the crop/forage exception and would not be considered a CAFO. Therefore, the Circuit Court's decision appears to reason that when animals are pastured, the pasture areas are part of the "area of confinement", which is how crops and forage could be grown *inside* that confinement area.

Farm Bureau disagrees with this reasoning. If pasturing areas were intended to be considered part of the

"area of confinement", what would Congress have considered to be "unconfined"? Farm Bureau is not aware of any situations where dairy animals are totally unconfined and allowed to roam completely free. If the animals are "pastured", then they are no longer "confined". Therefore, although the regulations do not define the terms "lot" or "facility", its use of the terms "confined" in part (i) of the CAFO definition, and "lot or facility" in part (ii) of that definition, when interpreted in combination, must refer to the barn, barnyard, or immediate enclosure. It then follows that the "crops/forage growth" language cannot reasonably require such growth to occur *inside* the actual stucture or confinement area. The only reasonable interpretation of part (ii) of the AFO definition is that the language "crops, vegetation forage growth, or post-harvest residues . . . sustained in the normal growing season *over any portion of* the lot or facility" refers to the lot where the barn or place of confinement is located, and the rest of the "facility," including adjacent fields, which are part and parcel of the overall farming operation.

CONCLUSION

For the reasons outlined above, certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

SOUTHVIEW FARM AND RICHARD H. POPP,

Petitioners,

v.

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL PORK PRODUCERS COUNCIL, AS AMICUS CURIAE, IN SUPPORT OF DEFENDANT-PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether a dairy farm that uses its animal manure to fertilize its feed crop fields is a "concentrated animal feeding operation" and thus a point source subject to the permit requirements of the Clean Water Act?

B. Whether manure-spreading equipment or a depression in a farm field, neither of which directly discharges pollutants into navigable waters, is a point source subject to the permit requirements of the Clean Water Act?

C. Whether liquid manure washed off farm fields by a rainstorm is an "agricultural stormwater discharge" exempt from the Clean Water Act's definition of point source?

D. Whether the Second Circuit Court of Appeals should have exercised restraint and referred this matter to the appropriate state or federal regulatory agency to be handled within the administrative framework established and designed specifically to address circumstances such as those presented in this case?

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I. AMICUS CURIAE'S INTEREST IN THE PROCEEDING

National Pork Producers Council (NPPC) is a nongovernmental, voluntary organization and is the largest commodity organization in the nation with an identified membership. NPPC is a grassroots producer organization made up of 45 affiliate state pork producer associations which have 90,000 members. NPPC is headquartered in Des Moines, Iowa and has an office in Washington, D.C. Its major purpose is the enhancement of the quality, production, distribution, and sale of pork and pork products. NPPC has an extensive environmental program that funds environmental research, conducts educational activities for producers, promotes science-based environmental policies, and helps producers confront challenges related to environmental law.

Pork production in the U.S. has risen steadily over the last 40 years. Pork has annual gross sales of over $11 billion, and approximately 236,000 pork producers raise 17 billion pounds of pork. The ten leading states in hog and pig inventory are Iowa, North Carolina, Illinois, Minnesota, Nebraska, Indiana, Missouri, South Dakota, Ohio, and Kansas. Ninety-three million head were commercially slaughtered in 1993 with the state of New York ranked 31st in annual marketings of hogs in that year, with 112,000 head. In 1993 the number of hog operations in the U.S. totalled 235,840.[1]

NPPC is vitally involved in advancing pork production interests. NPPC is actively involved in legislation

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[1] U.S. DEP'T OF AGRIC., HOGS & PIGS (1993).

which affects hog producers nationally and closely monitors federal and state laws and regulations, including those related to environmental regulation.

NPPC's Environmental Committee addresses key environmental issues facing the modern pork production facility. The Council's Science Advisory Task Force advises pork producers nationwide about the basic considerations involved in proper environmental management of an operation including manure application, water quality protection, and regulatory compliance.[2] In addition, NPPC has funded a thorough state-by-state examination of laws and regulations involving environmental aspects of hog production. This educational project is being carried out by the National Center for Agricultural Law Research and Information.

NPPC therefore has a vital interest in the subject matter involved in this litigation. NPPC is actively involved in advising its membership of the state and federal laws affecting their operations and is equally involved in representing member interests when those laws and regulations are considered and passed. NPPC's *amicus brief* provides the court with important information regarding the laws and regulations which apply in the Southview case and how the outcome of this case will affect hog producers nationwide.

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[2] The first joint publication of Committee and Task Force was the *Guide to Environmental Quality in Pork Production* (Fall 1992).

The description of Southview's dairy operation is not unlike the operations of countless hog producers nationwide. The activity of gathering and confining animals and managing the attendant manure from those operations by separation, storage, and eventual land application is a common practice within the agriculture sector. Approximately 85% of hogs are raised in confinement where manure is collected and stored for later treatment and/or utilization. The nature of Southview's operation intricately ties the facts of this case to the interests represented by NPPC and many other agricultural producers in the country.

II. FACTUAL BACKGROUND

The brief filed by Southview Farm with its Petition for Writ of Certiorari contains a detailed statement of facts. Therefore, only the following summary of facts is set forth in this *Amicus Brief*.

Southview Farm operates a 2,200 head dairy farm in rural Wyoming County, New York. Within that county, dairy farming is the largest industry. Southview Farm's operation involves a manure separation and storage system and the spreading of manure on crop lands adjacent to the animal confinement area. The action against Southview Farm was brought as a "citizen's suit" under the Federal Water Pollution Control Act, renamed as the Clean Water Act (CWA).[3] The citizen's suit brought against Southview Farm alleged violations of the CWA; specifically Section 301(a) which prohibits the discharge

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[3] 33 U.S.C. §§ 1251 *et seq.*

of pollutants. The Plaintiffs alleged violations of these provisions through leakage of manure from Southview Farm's storage lagoon into local surface waters and ground waters and from there into the Genesee River. In addition, Plaintiffs alleged that on several occasions Southview Farm sprayed liquid manure onto land in such quantities that it ran into discrete rivulets, into drainage ditches, and into adjacent surface waters that tributary into the Genesee River, and that Southview Farm sprayed liquid manure directly into such drainage ditches.

III. ARGUMENTS

A. WHETHER A DAIRY FARM THAT USES ITS ANIMAL MANURE TO FERTILIZE ITS FEED CROP FIELDS IS A "CONCENTRATED ANIMAL FEEDING OPERATION" AND THUS A POINT SOURCE SUBJECT TO THE PERMIT REQUIREMENTS OF THE CLEAN WATER ACT?

1. Southview Farm is not a "concentrated animal feeding operation" under the most reasoned interpretation of relevant statutory language.

In 1955, Congress first enacted legislation to control the polluting of the waters of the United States.[4] Unfortunately, the legislation did little to abate the amount of pollutants pumped, washed, or dumped into our national waters. Responding to the public demand for more stringent water quality controls, Congress in 1972 passed what was to become known as the Clean Water Act

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[4] 42 U.S.C. §§ 7401 *et seq.* (West 1955).

(CWA).[5] In enacting the 1972 CWA, Congress more thoroughly addressed the long term national goal of eliminating pollutants from United States waters in order to achieve and maintain the biological integrity of receiving waters and the interim goal of assuring that the nation's waters would at least support fish, wildlife, and sporting activities, and provide safe drinking water.[6]

Congress embodied in the CWA a dual regulatory system for safeguarding the nation's waters from pollution by expressly giving the federal government and state governments regulatory authority over different sources of pollution. In passing the 1972 legislation, "Congress made a clear and precise distinction between *point sources*, which would be subject to federal regulation, and *nonpoint sources*, control of which was specifically reserved to State and local governments."[7] In addition when Congress enacted the 1972 Amendments it thoughtfully considered how to regulate agricultural activities and, with the exception of concentrated animal feeding operations (CAFOs), Congress chose to regulate agricultural activities under the nonpoint source control provisions of section 208.[8]

Section 208 requires each state to develop management plans to address significant water problems. The management plans must assess both point source and

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[5] *Id.*

[6] 133 Cong. Reg. § 1691-01 (remarks of Leon G. Billings).

[7] S. Rep. No. 370, 95th Cong., 1st Sess. 8 (1977).

[8] Pub. L. No. 92-500, Section 208(b)(2)(f), 86 Stat. 816, 841, codified as amended at 33 U.S.C. § 1288(b)(2)(f).

nonpoint source problems. Return flows from irrigated land, runoff from manure disposal, and runoff from land used for livestock are to be covered in the management plans. Section 208 also requires states to specify feasible measures for controlling nonpoint source agricultural pollution.[9]

Congress defined point sources of pollution as pollution originating from a "discernable, confined and discrete conveyance."[10] This definition, with the exception of the inclusion of a CAFO, is oriented toward industrial and municipal polluters, not agricultural operations. Point source polluters are regulated by mandated technology-based standards and the requirement that they obtain a National Pollutant Discharge Elimination System (NPDES) permit from EPA prior to making discharges.[11] Congress has not chosen to specifically define what is meant by the term "nonpoint." However, the Environmental Protection Agency, which has been delegated the authority to implement and enforce the point source provisions of the CWA, has stated that "nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation."[12]

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[9] *Id.*, *see also* 33 U.S.C. § 1329. New York has adopted such a program and the program has been approved by the EPA.

[10] 33 U.S.C. § 1362(14).

[11] 33 U.S.C. § 1342.

[12] U.S. EPA, Office of Water, *Nonpoint Source Guidance* 3 (1987).

In the 1972 CWA, Congress went to great lengths to ensure that most agricultural activities would be classed as nonpoint sources of pollution and thereby subject primarily to state regulation. Congress did specifically choose to regulate one limited area of agricultural activity as a point source of pollution, Concentrated Animal Feeding Operations (CAFOs). Although Congress did not define a CAFO, CAFO is defined in the Code of Federal Regulations for the EPA at Section 122.23(b)(3) as follows:

> "Concentrated animal feeding operation" means an "animal feeding operation" which meets the criteria in Appendix B of this part, or which the Director designates under paragraph (c) of this section.[13]

An agricultural livestock operation is classified as a CAFO only if it is an "animal feeding operation" (AFO) and the operation exceeds the minimum livestock requirements of Appendix B.[14]

> An "animal feeding operation" is:
>
> . . . a *lot or facility* (emphasis added) (other than an aquatic animal production facility) where the following conditions are met:
>
> > (1) Animals (other than aquatic animals) have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period, and

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[13] 40 C.F.R. 122.23(b).

[14] Federal regulations set forth the minimum livestock requirement for slaughter and feeder cattle, dairy cattle, swine, horses, turkeys, laying hens or broilers, ducks and other animal units. *See* 40 C.F.R. § 122.23, Appendix B to Part 122, (a) and (b).

> (2) crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.[15]

In holding Southview Farm to be a CAFO, and thereby a point source because it is an animal feeding operation and "no crops . . . were sustained . . . over any portion of the *lot*," the Second Circuit Court of Appeals misconstrued the definition of an animal feeding operation. The Court of Appeals stated that the terms lot or facility, since undefined by the regulations, should be defined by the term "feedlot" found in 40 C.F.R. 412.10(b). Feedlot is defined as a concentrated, confined animal growing operation for meat, milk, or egg production, or stabling, in pens or houses wherein the animals or poultry are fed at the place of confinement and crop or forage growth or production is not sustained *in the area of confinement*. An animal feeding operation is defined differently, which implies that, although some animal feeding operations may be feedlots, not all of these will be defined as feedlots. The key difference in the definitions lies in the statement that an animal feeding operation does not include those operations which sustain crops, vegetation or post harvest residues *over any portion of the lot or facility*. Only feedlots require crops in the specific area of confinement to avoid being classified as CAFOs.

The EPA intended animal feeding operations to be subject to a broader definition by making the standard more inclusive. Instead of limiting the vegetative forage growth or crops to the area of confinement, as in the

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[15] 40 C.F.R. 122.23(b)(1).

feedlot situation, the EPA used the terms lot or facility. EPA Clean Air Act (CAA) regulations have traditionally defined facility in a much broader manner. For example, the EPA has defined facility as "all buildings, structures and *operations* on one contiguous site," in the air programs regulations (emphasis added).[16] In addition, EPA defines building, structure, *facility*, or installation as:

> all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). . . . [17]

EPA also has a third definition of facility which is similar to those definitions already discussed:

> "Facility" means any building, plant, installation, structure, mine, vessel or other floating craft, location or site of operations owned, leased, or supervised by an applicant, contractor, grantee, or borrower to be used in the performance of a contract, grant, or loan. Where location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility. . . . [18]

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[16] 40 C.F.R. 61.91(b) (1994) (section contains definitions relating to national emission standards for emissions of radionuclides other than radon from Department of Energy facilities).

[17] 40 C.F.R. 51.165(a)(1)(ii) (1994) (permit requirements for air programs and requirements for preparation, adoption, and submittal of implementation plans).

[18] 40 C.F.R. 15.4 (1994).

In its attempt to determine the meaning of a term undefined in the applicable statute or regulation, the court erred in not first referring to the definition of the *same* term in similar statutory or regulatory language. The court instead took the suggestion of the United States Department of Justice and equated the language "lot or facility" to the term "feedlot" and proceeded in its analysis from that point. By doing so the court ignored the fact that the term "facility", the exact term in the regulation at issue, is defined in similar regulations under the Clean Air Act (CAA) at 40 C.F.R. 51.165.

If the Second Circuit Court of Appeals had referred to the facility definitions provided in the CAA, the court would have had no choice but to conclude that Southview Farm is not an animal feeding operation or a feedlot as defined in the CWA. The Southview Farm facility includes the confinement facility as well as the contiguous or adjacent land in the area of confinement on which crops or forage are grown. The manure is applied to the adjacent crop or forage land and the entire operation is under the control of the same person (Southview Farm).

The inclusion of the language "lot or facility" in 40 C.F.R. 122.23(b)(ii) clearly requires a broader reading of the regulation than that given by the Second Circuit Court of Appeals. Obviously, the EPA has expressed a general intent to consider an entire operation to include the cropland that is contiguous to the confinement facilities, as in this case.

By reading and defining the terms of the regulation so narrowly, the court has in effect rendered the "crop/

vegetative growth" exception, that had been specifically drafted into the definition of an AFO, a nullity. In doing so, the court has included virtually every livestock farm operation within the definition of an AFO; thereby potentially subjecting all such operations to regulation as a CAFO point source with the determinative factor being the number of animals within the operation. If the court is correct, the exception for livestock operations would not have been necessary and would never have been drafted into the definition of an AFO in 40 C.F.R. 122.23(b)(ii).

Additionally, if the EPA had intended the term "feedlot" to be included in the definition of an AFO they would have used the term "feedlot" rather than the language "lot or facility." The term "feedlot" itself suggests a more restricted and confined area that is to serve a more particular purpose than the language "lot or facility" suggests.

The second method by which an agricultural livestock operation may be classified as a CAFO is that the EPA director may on a case-by-case determination designate an agricultural livestock operation as a CAFO. The director may do so only after determining that "the operation is a *significant contributor* (emphasis added) of pollution to the waters of the United States."[19]

By providing an additional method of regulating agricultural livestock operations as CAFOs, the regulations specifically provide the EPA with a means by which to regulate operations like Southview Farm as point

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[19] 40 C.F.R. 122.23(c).

sources if the circumstance so warrants. This is further proof that CAFO facilities such as Southview Farm were never intended to be regulated as point sources under the definition in 40 C.F.R. 122.23. In addition, the EPA has not chosen to regulate Southview by this method.

2. Regulation of nonpoint sources is properly within the purview of the state regulatory agency.

Under the Clean Water Act, point sources of pollution are regulated and are required to obtain a permit, either through the state or federal permitting scheme. New York has obtained permission from the EPA to implement and control its own permitting scheme for point sources of pollution. As a result, New York has determined that an agricultural operation which includes the raising of livestock and the growing of crops on a single lot or facility is not an "animal feeding operation" and therefore is not a "concentrated animal feeding operation."

Congressional debate over the CWA specifically contains references to the proper role of the states in regulating potential polluters. In 1987, President Reagan vetoed the 1987 amendments to the CWA because he feared that the amendments would give the Federal Government too much authority over farming practices. In successfully urging the Senate to join the House to override the President's veto, Senator John Chaffee of Rhode Island pointedly stressed that nonpoint sources of pollution would still be left to state control:

. . . the President states in his veto message that when we get into the nonpoint pollution control section of this bill, that this is Federal land use planning. There is a mistake in the interpretation that was given to the President on this. It just is not Federal land planning.

The nonpoint provisions in the bill were carefully crafted to avoid that. The primary role of the Federal Government in the nonpoint program, in other words, controling [sic] pollution from streets and runoff of fertilizers from the farms, the primary role of the Federal Government is to provide financial assistance to the States which are given the lead in developing their own programs. It is not Big Brother from Washington telling them how to do this. The States do this. We give them some money to help them. We do not mandate it. Farmers are not required to seek permission from the Federal Government to carry out their farming practices.

We have been around long enough to know that is a loser. That would kill the bill. Do you think the Senators from Montana or Maine or any of the States with large agricultural practices would vote for a measure like that? Of course they would not.

So the administration's arguments on that are really red herrings.

This is a strong environmental bill, it is a fiscally responsible bill, and it lives up to our national goal of making the Nation's waters fishable and swimmable.[20]

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[20] 133 Cong. Rec. § 1691-01.

The State of New York has established an extensive regulatory scheme to control both point and nonpoint source pollution. New York obtained EPA approval to run its state NPDES program on October 28, 1975 and established a program implementing the CWA permitting (NPDES) programs.[21] New York has passed state laws and adopted state regulations to require all point sources within the state to obtain a State Pollution Discharge Elimination System (SPDES) permit.[22] New York has always used the SPDES system for industries, but has generally considered agricultural operations to be exempt from permitting requirements. New York interpreted the terms "lot" or "facility" to include structures where livestock were housed and adjacent cropland was used for animal manure application. If an operation caused environmental damage, the state issued a cease and desist order requiring them to comply with the order.[23]

New York's interpretation is permissible in that the EPA has never attempted to correct the state's interpretation regarding agriculture, nor has the EPA criticized any

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[21] *See* JOHN D. COPELAND ET AL., *Environmental Laws Impacting New York Livestock Operations* (1995) (Published by the National Center for Agricultural Law Research and Information, 147 Waterman Hall, University of Arkansas School of Law, Fayetteville, AR 72701).

[22] The SPDES is the New York State version of the National Pollution Discharge Elimination System (NPDES) permit.

[23] Steve Marberry, *Appeals Court Calls Manure Spreading a 'Point Source,'* FEEDSTUFFS, Oct. 24, 1994, at 1. *See also* JOHN D. COPELAND ET AL., *Environmental Laws Impacting New York Livestock Operations* (1995) (Published by the National Center for Agricultural Law Research and Information, 147 Waterman Hall, University of Arkansas School of Law, Fayetteville, AR 72701).

other aspects of New York's environmental program. In the past, EPA has exercised authority over those programs that were deemed to be ineffective in curbing water pollution. One of the most recent examples is the establishment, through federal regulatory means, of a General Permit for four of the five states in Region VI of the United States.[24] This General Permit establishes a mechanism by which CAFOs in those states may be covered under a federal NPDES General Permit, determines the types of discharges allowed from those operations, and establishes requirements for land application of waste.

The court, through the encouragement of the EPA, has done for the EPA that which the EPA could not do given the facts of the case; i.e., require Southview Farm to have a permit based on a finding that it was a CAFO. If the facts had warranted it, the EPA had the authority to declare Southview Farm a point source, whether or not it fell under the definition of a CAFO, if Southview Farm was a "significant contributor" to pollution. The "significant contributor" provision, which is a feature of both the federal regulatory definition of AFO/CAFO and the New York state program, allows the regulatory authority to regulate an operation as if it were a point source polluter even though the operation may not come under the definition of a CAFO.

Southview Farm, however, was not declared a point source by the EPA or the state regulatory authority, even

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[24] The four states covered under the Region VI General Permit are Louisiana, New Mexico, Oklahoma, and Texas.

after complaints had been received and investigated regarding Southview Farm's operations. Some of these complaints were made by the members of the group which later became the plaintiffs in this case. Southview Farm's manure handling practices were thoroughly investigated and it was determined that Southview Farm did not need to obtain a permit because the operation was not a point source under the state's CAFO definition. Also, the facts did not warrant identifying Southview Farm as a "significant contributor" to pollution.

Clearly, the Second Circuit Court of Appeals erred in declaring Southview Farm to be subject to the CAFO permitting requirements of the CWA.

B. WHETHER MANURE-SPREADING EQUIPMENT OR A DEPRESSION IN A FARM FIELD, NEITHER OF WHICH DIRECTLY DISCHARGES POLLUTANTS INTO NAVIGABLE WATERS, IS A POINT SOURCE SUBJECT TO THE PERMIT REQUIREMENTS OF THE CLEAN WATER ACT?

The Second Circuit Court of Appeals also erred in holding Southview Farm's manure spreading equipment to be a point source. To sustain a ruling that land application vehicles are point sources would take away the distinction between nonpoint and point sources. Land application of animal manure is a traditional nonpoint source and to hold that the land application vehicles are point sources would create no viable alternative for getting liquid manure onto fields. If this aspect of land application is a point source, then it is virtually impossible to use land application as a method for disposing of

manure. However, almost all states *encourage* the use of land application by operations in order to cut down on the disposal problems of the liquid waste. Using land application achieves this result and creates an inexpensive and less chemical dependent method of fertilization. In fact, the EPA Region VI General Permit authorizes the use of land application of waste generated by CAFOs when done so in accordance with recognized practices of good agricultural management.[25] The EPA admits that the land application of waste is a normal "agricultural practice" and when "properly applied, animal wastes provide no more environmental risk than chemical fertilizers which would be used on the same land".[26]

To hold that the land application of animal manure is a point source as a result of the use of vehicles to apply the waste would result in complete chaos in major livestock producing states, especially when those states attempt to find new methods of waste disposal. To hold that a roving piece of equipment used in the application of waste to the land is a point source takes chaos into pandemonium in that it raises the issue as to whether other moving vehicles used in agricultural operations can also be considered point sources.

If the Second Circuit Court's ruling is allowed to stand, the costs to producers and consumers could dramatically escalate. The EPA estimates there are only 6,000 potential animal feeding operations nationwide. But a pork industry study found over 30,000 operations with

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[25] 58 Fed. Reg. 7610, 7629 (Feb. 8, 1993).

[26] *Id.*, at 7622 (Feb. 8, 1993).

more than 1,000 head of swine. Since almost all of these operations use land application as a form of manure utilization and/or treatment, the number of permittees will skyrocket. Those states which currently run federally approved water quality permitting programs will be forced to regulate even the smallest of operations as point sources. Many agricultural operations may be forced out of business if they are unable to find alternate sources of disposing of animal manure or cannot bear the costs associated with using alternate disposal methods, such as paying for the transportation of the manure to approved offsite places of disposal. The court's ruling could also affect the availability of agricultural credit by further worsening an already difficult situation. Lenders will have to worry about their own CWA liability if virtually all livestock operations, which use the traditional means of applying animal manure to adjacent crop or forage land, are declared to be CAFOs. *See Kelly v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994) (holding that lenders may be liable under CERCLA).

C. WHETHER LIQUID MANURE WASHED OFF FARM FIELDS BY A RAINSTORM IS AN "AGRICULTURAL STORMWATER DISCHARGE" EXEMPT FROM THE CLEAN WATER ACT'S DEFINITION OF POINT SOURCE?

The question of what Congress intended by exempting agricultural stormwater discharges from the definition of a point source has been adequately argued in the Petition for Writ of Certiorari submitted by Petitioners. NPPC agrees and incorporates the argument contained

on pages 15 through 18 of Petitioners' brief under the heading "Congress Expressly Exempted Agricultural Stormwater Discharges From the Definition of Point Source."

D. WHETHER THE SECOND CIRCUIT COURT OF APPEALS SHOULD HAVE EXERCISED RESTRAINT AND REFERRED THIS MATTER TO THE APPROPRIATE STATE OR FEDERAL REGULATORY AGENCY TO BE HANDLED WITHIN THE ADMINISTRATIVE FRAMEWORK ESTABLISHED AND DESIGNED SPECIFICALLY TO ADDRESS CIRCUMSTANCES SUCH AS THOSE PRESENTED IN THIS CASE?

In the Southview Farm case the Second Circuit would have better served the interests of all parties concerned by subscribing to the age old doctrine of judicial restraint which teaches "that patience in the judicial resolution of conflicts may sometimes produce the most desirable result."[27] As explained in this amicus, the Second Circuit erroneously classified Southview Farm as a point source subject to the CAFO provisions of the CWA. The court totally ignored the extensive regulatory scheme for both point and nonpoint sources established by the State of New York with the blessing of the EPA. The court also ignored the state and federal statutory and regulatory provisions which would have permitted action against

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[27] John P. Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982).

Southview Farm if the facts had established Southview to be a "significant contributor" to pollution.

By deferring this matter to state regulators, the court could have avoided the potential chaos its ruling may create in agricultural production methods, in the state and federal environmental regulation of agriculture, and agricultural lending. By acting as it did, the court has called into question the heretofore accepted agricultural practices of thousands of farmers in dozens of states, the existing agricultural regulatory system of no less than 20 states and the Federal Government, and has further tightened the purse strings of the already weary agricultural lenders who have an eye towards the previously mentioned *Kelly* case.

Unless the Supreme Court grants certiorari the ruling of the Second Circuit Court of Appeals will have an unwarranted and legally indefensible negative nationwide impact on livestock operations.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari filed by petitioner Southview Farm should be granted.

Respectfully submitted,

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EDITOR'S NOTE

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In The Supreme Court Of The United States

October Term, 1994

SOUTHVIEW FARM AND RICHARD H. POPP,
Petitioners,

v.

CONCERNED AREA RESIDENTS FOR
THE ENVIRONMENT, et al., Respondents,

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE NORTHEAST DAIRY PRODUCERS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a dairy farm, using its animal waste to fertilize cropland adjacent to its cattle housing facilities, is a "concentrated animal feeding operation" and thus a point source subject to the permit requirements of the Clean Water Act.

2. Whether previously applied liquid manure, washed from fields by a rain storm, constitutes an "agricultural stormwater discharge," exempt from the Clean Water Act's definition of point sources.

3. Whether vehicles spreading manure onto cropland or depressions in fields, neither of which directly discharge pollutants into navigable waters, may constitute point sources subject to the permit requirements of the Clean Water Act.

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BRIEF *AMICUS CURIAE* OF THE NORTHEAST DAIRY PRODUCERS ASSOCIATION IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

The Northeast Dairy Producers Association ("NEDPA") submits this brief as *amicus curiae*, pursuant to Rule 37.2 of the Rules of this Court, in support of Petitioners, Southview Farm and Richard H. Popp (the "Petitioners"). The written consents of Petitioners and

Respondents to the filing of this *amicus curiae* brief are attached as Appendix A.

INTEREST OF NEDPA AS *AMICUS CURIAE*

NEDPA is an association of 75 forward-looking dairy producers committed to an efficient, profitable, environmentally-conscious and consumer-oriented dairy industry in the northeast. NEDPA's members, located primarily in New York State, own and operate farms on which approximately 37,000 dairy cows are milked. The production from these farms accounts for more than $111 million of gross annual sales. The 29 associate members of NEDPA represent the interests of agribusiness, from veterinarians and consultants to lenders and cooperatives.

NEDPA endeavors to encourage and provide forums for the free exchange of ideas among producers, to provide leadership and financial support for addressing industry issues, to develop and support programs that encourage young people to establish careers in the dairy industry and to work with government to ensure a favorable business climate in the northeast. To that end, NEDPA sponsors informational meetings, conferences, tours and university research on industry issues. In addition, NEDPA members are actively involved in organizations representing the breadth of the dairy industry, and agriculture generally, at the local, state, regional and national level. NEDPA members are industry and community leaders.

The questions presented in the Petition transcend the interests of the parties to this case. The ultimate answers to the questions are of particular importance to the future of NEDPA and its members, and to the dairy industry in New York, the northeast and throughout the United States. The Second Circuit would implement a permit system and impose

strict regulations on long-standing farming practices and research-based recommendations relating to the use and management of animal wastes, which have never been the subject of governmental controls. Crop management practices that have been used for centuries would be impacted irreversibly. Regulatory compliance and the necessary transformation of production methods would add significantly to dairy production costs, placing an industry currently suffering from declining operating margins in an even more precarious position.

Judicial imposition of "permitting requirements" on farmers who are recycling natural, organic material to the land, would be in direct contradiction of Congressional legislation and Environmental Protection Agency ("EPA") regulation exempting such actions, and is ill-advised and irresponsible.

ARGUMENT

The decision of the Second Circuit (*Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994)) disregards the practical import and effect of regulating animal waste management practices as point source discharges. The holding also ignores Congressional policy and directives relative to these issues and goes far beyond the scope of regulation intended by Congress in the Clean Water Act.

It is for these reasons that this Court should grant certiorari. The Second Circuit should not be allowed to usurp the powers of Congress and embark on its own program of judicial legislation and regulation. Allowing its decision to stand will significantly harm the dairy industry, specifically, and agriculture generally.

I. THE ISSUES PRESENTED BY THE PETITION ARE OF VITAL IMPORTANCE.

A. Local and State Economies are Dependent Upon the Substantial Contributions of Agriculture and the Dairy Industry.

Agriculture is New York State's largest industry. Roughly 8.2 million acres of land are utilized for agricultural production. New York Agricultural Statistics Service, New York State Department of Agriculture and Markets with United States Department of Agriculture, *New York Agricultural Statistics 1993 - 1994* (hereinafter *New York Agricultural Statistics*) 6. Land in agriculture accounts for 27% of New York's total land area. *Id.* On this land base, New York's farmers generate in excess of $2.6 billion in agricultural product sales. Department of Agricultural, Resource, and Managerial Economics, Cornell University, E.B. 94 - 26, *Census of Agriculture Highlights; New York State, 1992* (hereinafter *Census of New York Agriculture*) 9. More than 50% of these sales ($1.4 billion) are dairy products. *Id.*

Much of the cropland in New York, and the northeast, is best suited for growing forage crops. These, in turn, are converted most efficiently by dairy animals into saleable products. *Id.* at 2. As a result, dairying is the dominant industry in most upstate New York counties, as well as elsewhere in the northeast. As the third-ranking state in milk production, New York's agricultural economy is critically dependent upon the dairy industry. *New York Agricultural Statistics*, at 12.

In almost every county of New York, farm expenditures on inputs for production exceed $20 million,

adding significantly to each counties' economy. *Census of New York Agriculture*, at 30 & 54. The importance of this "value-added" element is also seen in the multiplier effect of local agriculture. Common estimates place the agricultural multiplier in the range of $3.00 - $5.00 (e.g., for every dollar received from farmers for selling agricultural goods and services, $3.00 - $5.00 are earned by local businesses and processors serving farmers and their customers). American Farmland Trust, *Is Farmland Protection a Community Investment?* 3 (1993). No industry has a comparable multiplier. By way of comparison, the estimated multipliers for the service and trade industries are 25% and 30% less than that for agriculture.

"Cost of community service studies," demonstrating the relationship between the real property tax revenues generated by an industry and the cost of services provided to that industry, reveal other benefits of agriculture to local economies. Typically, such studies find that for every dollar of revenue raised from the residential sector, local municipalities spend approximately $1.12 on public services. *Id.* at 2, 21 - 24. For every dollar raised from agricultural lands, only 33¢ is spent on services, leaving 67¢ to off-set other public and community expenses. *Id.*

U.S. agriculture, and the dairy industry in particular, has become a leader in the low-cost production of food. American farmers are the world's most productive; each farmer produces food and fiber for an estimated 128 people -- 94.3 people in the United States and 33.7 people abroad. American Farm Bureau Federation, *Farm Facts*, at 18 (Data supplied by United States Department of Agriculture). Each consumer in the United States is supported annually by the output from only one and one-quarter acres of land. *Id.* at 21. Consumers in this country spend a smaller percentage (10 - 13%) of their income on food than consumers in other

countries. *Id.* at 17; World Bank, *World Development Report 1992 - Development and the Environment* 236 - 37 (1992). By comparison, French consumers spend 16 - 17% of their income on food, Japanese 18%, Russian 28%, and Mexican 33 - 35%. *Id.*

Put simply, agriculture generates substantial direct and indirect economic benefits for local and state economies, while imposing few burdens upon them. Furthermore, consumers in this country, as well as abroad, have come to know, depend upon and demand the low-cost, high-quality food produced by American farmers. Imposing additional costs and unnecessary regulation on agriculture will not only hurt individual farmers, but will also weigh heavily on other sectors of our society.

B. Agricultural Products are Generated at Slim and Decreasing Margins, and Under Conditions Largely Beyond the Control of Individual Farmers. Adding to the Costs of Production Will Cripple the Industry.

In 1993, the average net cash return per farm in the State of New York was approximately $14,100. *Census of New York Agriculture,* at 12. Between 1983 and 1993, operating margins for New York dairy farmers declined by 75¢ per hundred weight of milk sold. Department of Agricultural, Recourse, and Managerial Economics, Cornell University, R.B. 94 - 07, *Dairy Management Business Summary; New York State 1993*, at 3 (hereinafter *Dairy Business Summary*). Considering that the price per hundred weight of milk over this same period averaged $13.21, this reduction in operating margin is substantial. *New York Agricultural Statistics*, at 76.

Since 1937, the Secretary of Agriculture has regulated the price paid to producers of raw milk through the milk marketing order system. 7 U.S.C. § 601 et seq. (1980). While these governmentally established prices are designed to stabilize prices and establish price floors, they are, for all practical purposes, the actual prices paid to producers. The sheer number of producers makes it impossible for individual farmers to exert market power and effect the price paid for their milk. As a result, the price received by dairy producers for their milk is a matter beyond their control. Dairy producers cannot pass along any increases in the costs of production. This is a situation they must accept and factor into their business equation.

Given the limited ability to effect the price of outputs and thereby pass along increased production costs, dairy producers are left to control these costs, as best they can. Of the total costs of producing milk, feed and crop expenses constitute approximately 30%. *Dairy Business Summary*, at 27. Much of this expense derives from purchased grains and feed concentrates needed to provide a nutritionally balanced ration to dairy cattle. In a manner similar to the price controls placed upon milk, the Secretary of Agriculture regulates the price of many feed grains. 7 U.S.C. § 1421 et. seq. (1988). As a result, producers have little to no control over the cost of purchased feed inputs. Furthermore, even if dairy producers can manage the costs of "home grown" feed stuffs, the degree of management is always subject to an unknown and unmanageable factor -- the weather.

Because dairy producers do not control the price of their product and cannot exert substantial control over one of the largest components of their expenditures, management of all remaining production costs is of great importance. The Second Circuit's holding would impose substantial additional

costs on the production of dairy products; costs which will fall directly on individual farmers.

C. The Recycling of Animal Waste is an Essential Part of Farm Nutrient Management Programs. It Renders Substantial and Essential Benefits to the Economic and Environmental Well-Being of Farms and their Surrounding Landscapes.

In the face of declining operating margins, dairy farmers have adopted more effective and efficient feeding strategies and crop management systems to reduce the costs of production and maintain profitability. Utilization of naturally occurring, organic animal wastes as part of a nutrient management program is an essential component of any dairy production and crop management system.

Agriculture, and the dairy industry in particular, have long recycled the naturally occurring, organic, animal waste, known as manure, as part of their production and management efforts. Rather than treat these byproducts as refuse for disposal, farmers have, consistent with recommendations from agricultural scientists, used and recycled manure as part of their management efforts. By recycling nutrients from animals to crops and back to the animals again, farmers can increase crop and animal productivity and minimize nutrient losses that damage the environment. Stuart Klausner, Department of Soil, Crop and Atmospheric Sciences, Cornell University, 95WFPI, *Nutrient Management: Crop Production and Water Quality* 3 - 4, 34 (1995). The benefits of nutrient management include reduced dependency on chemical fertilizers, improved soil quality, and the efficient and economic production of feed and animal products. *Id.*

The Second Circuit's holding would wipe out long-standing, recommended practices and inhibit the productive use of animal waste, in favor of its treatment as mere refuse and offal. The holding would also impede industry efforts to increase efficiency and production, both of which ultimately benefit consumers. The regulations and practices that will be forced upon the industry as a result of the holding will substantially increase the costs of production to individual farmers, with the resulting impact felt on the farm, in the grocery store and on local economies.

II. THE SECOND CIRCUIT DECISION IS INCONSISTENT WITH LAW AND INCOMPATIBLE WITH ESSENTIAL FARM PRACTICES. IT WILL RENDER THESE PRACTICES UNECONOMICAL, TO THE EXTREME DETRIMENT OF THE INDUSTRY.

The alleged Clean Water Act violations at issue in this case relate to the application of liquid manure onto cropland from tank spreaders and a spray pivot system. At no time did Southview dump manure into navigable waters. The alleged discharge was not from a discrete point, but was diffuse runoff from cultivated croplands. This migration of previously applied manure occurred after rain storms. The resulting stormwater runoff from the fields contained some of the previously applied manure.

The Second Circuit's holding represents a tortured interpretation of the definitions of "point source discharge" and "concentrated animal feeding operation." It also completely disregards the Congressional exemption and underlying policies adopted to benefit agriculture. The holding violates the long-standing legal principles of separation of power and judicial restraint. If allowed to

stand, the holding will damage agriculture, individual farmers, local and state economies and consumers.

A. The Second Circuit's Expansion of the Point Source Discharge Definition to Vehicles and Depressions that Do Not Discharge to Navigable Waters is Unreasonable and Will Devastate American Agriculture.

Point sources of pollutant discharge, which are regulated by pollution discharge elimination system permits, are restricted to a "discernable, confined and discrete conveyance." 33 U.S.C. § 1362(14) (Supp. 1994). They include pipes, ditches, channels and the like, through which pollutants are discharged to navigable waters. *Id.* By contrast, nonpoint source pollution "does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation." U.S. EPA, Office of Water, *Nonpoint Source Guidance* 2 (1987). Nonpoint sources of pollution are regulated by the states through their land use decisions. 33 U.S.C. §§ 1288 and 1329 (1986 & Supp. 1994). By definition the term point source "does not include agricultural storm water discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14) (Supp. 1994). Congressional intent could not be more clearly or more directly stated.

Departing from the point/nonpoint dichotomy established by Congress, the Second Circuit made the extreme finding that vehicles spreading manure onto cropland, in accordance with standard crop fertilization procedures, constitute point sources of discharge. 34 F.3d 114, 119. In a like manner, the Court opined that a depression in a field is

itself a point source. *Id.* at 118 - 19. Each of the Court's holdings disregards the "discreteness" or the "directness," or lack thereof, of the "discharge" being analyzed. The holdings make discharges to the ground and discharges to low spots on a farm direct discharges to navigable waters.

The Second Circuit's own recitation of the facts illustrates the remoteness and defuse nature of any "discharge" -- liquid manure was spread onto cropland containing a swale. There is no indication the liquid manure then flowed directly to a navigable water. Instead, following a rainfall, some of the manure, now mixed with rain water, spread, ultimately reaching a pipe that ran under a stonewall bounding the cropland; the pipe in turn lead to a ditch, and the ditch lead to a stream. *Id.* at 118 - 21. This is not a direct discharge; it is stormwater runoff.

In effect, the Second Circuit's new point source discharge definition would subject any manure spreading vehicle and any open cropland to point source permitting restrictions. Its interpretation is apparently based upon the supposition that derivatives of materials spread upon cropland could, at some later point, reach navigable waters. With the sweep of its pen, the Second Circuit has effectively redefined long-recognized nonpoint sources as point sources.

The Second Circuit's unwarranted and unreasonable extension of the point source discharge definition would subject all of New York's approximately 9,700 dairy farms, as well as the estimated 140,000 dairy farms in the United States, to the requirement of obtaining a "point source" permit. This judicially-created permit requirement of the Second Circuit is in direct conflict with the express language of the Clean Water Act and its implementing regulations, which seek to control <u>direct</u> discharges to navigable waters. The decision would impose a tremendous burden on dairy

producers. The need to correct the decision becomes all the more imperative when one considers the size of the program and administrative budget that will be needed to undertake such a permitting program. Legislative and administrative processes are designed to examine and evaluate such issues. The provisions of the National Environmental Policy Act ("NEPA"), Administrative Procedure Act ("APA") and related statutes apply. Judicial legislation is not the process by which such a fundamental change in permitting requirements is enacted.

B. The Second Circuit's Application of the CAFO Definition is Incompatible with Viable Agricultural Practices and Inconsistent with the Law.

Under the Second Circuit's holding, the definition of a concentrated animal feeding operation ("CAFO") is rendered nonsensical. The Second Circuit misunderstands the dairy production process when it determines that, in order to avoid the CAFO characterization, Southview, and similarly situated dairy farms, must grow vegetation in areas of animal confinement. The Second Circuit's holding also evidences a misunderstanding of the ability of farmland, on which crops are grown, to absorb, assimilate and utilize, to the benefit of the business and the environment, animal wastes. Lastly, the Court underestimates the central and essential role that these processes play in the production of agricultural products.

The Court's holding is not only incompatible with agricultural practices, but also with the express language and intent of the applicable regulations.[1] A straight forward

[1] The Second Circuit's apparent misapprehension is understandable in light of the fact that the CAFO characterization of Southview Farm was never

reading of the regulations reveals that Southview Farm and the activities at issue in this case simply do not fall within the CAFO definition.

A farm must first qualify as an "animal feeding operation" in order to even be considered as a CAFO. Excluded from regulated animal feeding operations are livestock farms that grow crops or vegetation "over any portion of the lot or facility." 40 C.F.R. § 122.23 (1994) (emphasis added). The use of the disjunctive "or" evidences a crucial regulatory distinction between a "lot" and the "facility." By definition, livestock farms with active cropland areas are not "animal feeding operations." The preamble to the CAFO regulations further evidences the intent to exempt farms that possess cropland and recycle manure to the cropland. Specifically, in reviewing the entire CAFO regulatory scheme, the EPA stated that "no permits would be required from owners or operators of operations which recycle all pollutants to the land...." 41 Fed. Reg. 11,458, at 11,459 (1976).

In its holding, the Second Circuit ignored both the language and the express intent of the animal feeding operation definition. The Court effectively divided a single operating dairy farm, of inextricably interdependent parts, into an artificial grouping of nonviable, separate and distinct units. Southview Farm, and dairy farms all over the United States, have recycled animal wastes generated on one portion

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briefed by either party to this case. Rather, the CAFO issue was raised for the first time in an amicus brief filed by the United States three (3) working days before oral argument and long after the parties' briefs had been submitted. Despite the single-sided briefing of this issue, the Second Circuit denied Petitioner's motion for leave to file supplemental brief, opting not to balance the arguments and receive a complete briefing of an issue that ultimately proved central to the decision.

of the facility by applying them to the cropland on other portions of the same facility. The process has been ongoing for centuries. The Second Circuit would inhibit this long-standing, beneficial use of animal waste and the profitable production of dairy products by arbitrarily dividing farms into regulated "non-vegetated lots" and unregulated croplands. The distinction makes no sense and ignores the realities of modern farming. There can be no serious question that crops were grown on Southview Farm. As such, it does not come within the animal feeding operation definition.

Even if Southview Farm qualified as an animal feeding operation, to fit within the CAFO definition, it must meet two further criteria. First, one of two animal unit thresholds must be satisfied. Second, pollutants must be "discharged into navigable waters from a manmade ditch, flushing system or other similar man-made device; or pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation." 40 C.F.R. §122.23 and App. B (1994).

Although Southview Farm meets the first, animal unit criterion, it fails the second. At no time were pollutants discharged into navigable waters through a "manmade" device as that term is expressly defined. Manmade devices are limited to those "constructed by man and used for the purpose of transporting waste." 40 C.F.R. §122.23, App. B (1994). (emphasis added). There is no evidence that Petitioners discharged the defuse runoff at issue in this case into navigable waters through such a manmade device. In addition, no pollutants were directly discharged into navigable waters that pass through the facility or come into direct contact with animals housed there.

The Second Circuit's holding evinces a misunderstanding of agricultural production processes and a misapplication of the express provisions of the applicable regulations. The misunderstanding underscores the importance of obtaining the parties' full briefing of each issue that comes before a court. The Court's failure to allow full briefing in this case is critical, especially when the issue upon which full briefing was denied became the lynchpin to the ultimate decision.

C. The Second Circuit Would Render the Agricultural Stormwater Discharge Exemption Enacted by Congress A Complete Nullity.

The Second Circuit's holding would neuter the agricultural stormwater discharge exemption expressly granted by Congress and enacted by the EPA. In amending the Clean Water Act in 1977 to exclude "return flows from irrigated agriculture," Congress stated that "All such sources, regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F)." S. Rep. No. 95-370, 95th Cong., 1st Sess. 35 (1977) *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360. Section 208 refers to the nonpoint source control provisions of the Clean Water Act. 33 U.S.C. § 1288 (1986). Congressional intent could not be clearer.

Congress also voiced its policy relative to agricultural runoff at the time it amended the Clean Water Act to regulate certain forms of industrial and municipal stormwater runoff as point source discharges. At the point in time when Congress specifically brought industrial and municipal stormwater runoff under the point source regulations,

Congress expressly exempted "agricultural stormwater discharges" from the point source definition. 33 U.S.C. §1362(14) (Supp. 1994) (*amending* 33 U.S.C. § 1362(14) (1986)). By definition, agricultural stormwater discharges are not "point sources." *Id.*

As stated by the EPA:

> The following discharges do not require NPDES permits:
>
> . . .
>
> (e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range land, and forest lands. . . .

40 C.F.R. § 122.3 (1994).

The phrase stormwater was further clarified by the EPA in the agricultural context when it explained that "storm water runoff includes runoff caused by rainfall . . . which flows overland instead of percolation into the soils...." 58 Fed. Reg. 7610, 7614 (1993).

The "discharge" at issue in this case is precisely the type of occurrence that Congress and EPA have specifically addressed. The alleged discharge from Southview Farm constituted a diffuse migration of rainwater, containing manure which had been previously applied to cropland. Such runoff fits squarely within the exemption for agricultural stormwater. The Second Circuit has chosen to ignore the broad exemption created by Congress and implemented by the EPA. Indeed, the Second Circuit has interpreted the exemption out of existence.

D. The Second Circuit's Expansion of Point Source Regulations will Add Substantially to the Costs of Production, Rendering Farm Practices and Businesses Uneconomical.

The direct costs of compliance with the Second Circuit's expanded point source regulations are obvious: permitting fees, legal fees, laboratory fees, engineering fees, monitoring activities and recordkeeping. As applied to modern dairy farms, the costs of these efforts, by any measure, will be substantial. For instance, daily monitoring and recordkeeping of the waste produced by 100 animals and subsequently disbursed on 100 acres of land (an average or even small farm in today's agriculture) would involve a great deal of time and voluminous records.

The not-so-apparent costs of regulating the application of animal waste to cropland as a point source are, however, even more substantial. Given the Second Circuit's unwillingness to accept Congress' agricultural stormwater exemption, producers could only hope to avoid the point source characterization of rain-driven runoff by applying manure during extended periods of dry weather. Producers would likely be required to possess increased storage capacity and twice the equipment in order to apply animal waste during these limited windows of permissible application. For the remainder of the year, the substantial additional investments in equipment would lie idle. Even then, a subsequent rainfall could result in what the Second Circuit would characterize as a point source discharge. Similarly, the additional time required to implement new production methods and ensure compliance will substantially increase labor costs. Finally, insurers and lenders in the agricultural sector are watching with a close eye and are concerned that

the costs of insurance and credit will rise as a result of the Second Circuit's decision.

The Second Circuit's imposition of point source permitting will add substantially to the costs of recycling manure produced on the farm. These added costs or the alternate cost of disposal and purchase of substitute chemical fertilizers will place extreme financial pressures on an industry already working on reduced margins.

III. THIS CASE PROVIDES AN APPROPRIATE CONTEXT FOR THIS COURT TO ADDRESS THE IMPORTANT QUESTIONS PRESENTED BY THE PETITION.

The impacts of the Second Circuit holding in this case will be felt both on the farm and in surrounding local and state economies. Costs of regulatory compliance will further erode the diminishing operating margins realized by dairy farmers. The mandated permitting of all manure spreading vehicles and cropland will substantially add to operating costs. The broad and extreme interpretation of the concentrated animal feeding operation provision will force the industry toward smaller, less efficient and more costly operations. The refusal to recognize the agricultural stormwater exemption will place all manure application processes at risk due to the inability to accurately predict or control weather. The loss of farms and farm production that will result will impact local economies dependant upon their agricultural tax base and the agricultural multiplier to support their economies. In addition, there will be a cost to be paid by the consumer, who has come to know, depend upon and demand low-cost, high-quality food.

It is precisely for these reasons that Congress chose to regulate the defuse discharges associated with agricultural practices as nonpoint discharges to be controlled through state and local land use decisions. It is also precisely for these reasons that the point source discharge and concentrated animal feeding operation definitions should be interpreted consistent with viable agricultural practices and express Congressional mandates. Congress adopted the agricultural stormwater discharge exemption for legitimate and practical reasons. The Second Circuit should not be allowed to override Congressional policy through tortured interpretations of clear and unequivocal terms. This is clearly an occasion for judicial restraint -- not judicial legislation.

CONCLUSION

For the reasons stated, the Northeast Dairy Producers Association respectfully requests that this Court grant certiorari.

March 29, 1995

Respectfully submitted,

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Counsel for Northeast Dairy Producers Association

APPENDIX A

CONSENT OF ALL PARTIES TO THE FILING OF AN *AMICUS CURIAE* BRIEF BY THE NORTHEAST DAIRY PRODUCERS ASSOCIATION IN SUPPORT OF PETITIONERS

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February 6, 1995

Thomas Shephard, Esq.
Bond, Schoneck & King
1 Lincoln Center
Syracuse, NY 13202

Dear Tom:

I hereby consent to the filing of an amicus brief on behalf of the Northeast Dairy Producers Association, et al., in support of petitioner in Southview Farm, Inc. v. Concerned Area Residents for the Environment.

Yours truly,

Timothy S. Bishop
Counsel of Record
for the Petitioner

TSB:am

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March 21, 1995

Thomas M. Shephard, Esq.
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Re: Concerned Area Residents for the Environment, et al
v. Southview Farm et ano

Dear Mr. Shephard:

I am in receipt of your letter, dated March 20, 1995, in connection with the above-referenced matter.

Please be advised that, on behalf of the plaintiffs, I hereby consent to your filing an amicus brief on behalf of the Northeast Dairy Producers Association. I am enclosing a signed copy of this letter, as per your request.

Very truly yours,

Dan O'Brien

DOB:es

Enclosure

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MAR 24 1995
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March 20, 1995

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Re: Southview Farm and Richard H. Popp v.
Concerned Area Residents for the Environment, et al.

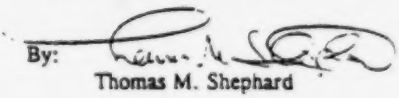
Dear Mr. O'Brien:

On behalf of the Northeast Dairy Producers Association, we request your consent, as attorney for Respondents, Concerned Area Residents for the Environment ("C.A.R.E."), to file a brief as *amicus curiae* in the above-noted matter. Please signify your consent to the filing of an amicus brief by the Northeast Dairy Producers Association by signing on the line provided below and return one copy of this letter to me at the address listed above.

Please call if you have any questions. Thank you for your assistance in this matter.

Very truly yours,

BOND, SCHOENECK & KING, LLP

By: 
Thomas M. Shephard

TMS/cma

Consent of Respondents, C.A.R.E., to the filing of an *amicus curiae* brief by the Northeast Dairy Producers Association

By: _____
Donald W. O'Brien, Jr.
Woods, Oviatt, Gilman, Sturman
& Clarke
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Supreme Court, U.S.
FILED
APR 6 1995
OFFICE OF THE CLERK

No. 94-1316

In the Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHVIEW FARM AND RICHARD H. POPP,
Petitioners,

v.

CONCERNED AREA RESIDENTS FOR
THE ENVIRONMENT, *et al., Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Nine *amicus* briefs have been filed in this case urging this Court to grant certiorari. These briefs, filed by the State of New York, by the New York Assembly's Joint Legislative Commission on the Dairy Industry, and by organizations representing interests as diverse as Farm Credit cooperatives, farm equipment manufacturers, farmers, ranchers, milk producers, and pork producers, attest to the critical importance to American agriculture of the issues presented in Southview Farm's petition.

The court of appeals has vastly expanded the reach of the CWA by effectively requiring New York's 9,700 dairy farms and, by extension, the approximately 140,000 dairy farms nationwide, to enroll—for the first time—in the CWA's permit program. Contrary to respondents' assertion (at 8)—and as the extraordinary range of *amicus* submissions clearly demonstrates—we do not "exaggerate" the reach of the court of appeals' decision. Almost all dairy farmers manure their fields with mechanical spreaders, almost all such spreading takes place near brooks, streams, gullies, or other potential "waters of the United States," and the threat of rain washing some of that manure into those waters is always present. See NY Leg. Comm'n *Amicus* Br. at 6.

With a stroke of the pen, then, the court of appeals has transformed manuring into a point source of pollution subject to an intricate and extremely burdensome scheme of federal regulation. Farmers, whose operating margins are inelastic and declining (see Northeast Dairy *Amicus* Br. at 6-8), are in no position to absorb the significant costs being thrust upon them by the court below. No wonder the State of New York maintains that the court of appeals' decision "threatens the economic viability" of that State's vital dairy industry. NY State *Amicus* Br. at 2.

Moreover, by redefining the term "point source" to encompass routine agricultural activities, the court of appeals has all but gutted the alternative, state-based regulatory scheme set forth in sections 208 and 319 of the CWA. Its

opinion thus severely disrupts the "'partnership between the States and the Federal government'" anticipated by the CWA. NY Leg. Comm'n *Amicus* Br. at 10 n.4 (quoting *New York* v. *United States*, 112 S. Ct. 2408, 2424 (1992)).

1. Respondents misconvey the procedural posture of this case. The district court determined *as a matter of law* that there was no point source discharge from Southview. Respondents' focus on the jury verdict is thus misplaced, because the jury's factual findings are not at issue.[1] What *is* at issue is the district court's legal judgment that a large dairy farm growing its own feed crops is not a CAFO and therefore is not a point source, that manure spreaders are not point sources, and that manure washed off a farm by heavy rains is an agricultural stormwater discharge and thus not a point source.[2] These are purely legal questions, about which farmers and state regulators had developed settled expectations that have now been destroyed by the court of appeals' countertextual reading of the CWA. It is fully appropriate, then, for this Court to correct the court of appeals' gross misconstruction of such an enormously important statute.

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[1] Respondents' "Factual Background"—which contains not a single citation to the record or to the opinions below—bears not the least resemblance to the facts upon which the Second Circuit relied in reaching its decision. For example, neither of the two opinions below so much as mention respondents' allegations that the manure spread on Southview's fields contained chlorine or phosphore acid washes (Resp. Br. at 6), or that Southview has an underground piping system (*id.* at 7), or that there was ever a rupture of those pipelines. *Id.* at 13 n.4.

[2] Respondents quote extensively—but irrelevantly—from pre-trial rulings of the district court. It is that court's post-trial Rule 50(b) ruling that represents its considered judgment on the legal questions at issue here. See Pet. App. 24a.

2. Respondents concede (at 14) that "most agricultural pollution is nonpoint source." They therefore try to squeeze Southview into the only exception to that rule written into the statute—the exception for CAFOs. But it is clear that Congress did not have dairy farms in mind when it legislated the CAFO exception. Rather, the term CAFO was designated for the assembly-line-like operations used to feed and fatten *beef* cattle. Am. Farm Bur. *Amicus* Br. at 12. CAFOs typically have animal-unit-to-acreage density ratios of at least 10 to 1 and often much higher. A good example is the CAFO in *Carr* v. *Alta Verde Indus., Inc.*, 931 F.2d 1055 (5th Cir. 1991), a case relied on by respondents (at 15), where 230 acres of land housed up to 30,000 head of cattle, a ratio of over 130 to 1! *Id.* at 1057. In contrast, Southview, a typical large dairy farm, has an animal-unit-to-acreage density ratio of only 1.35 to 1. Tr. 1947-1949. Congress's policy decision to subject the gargantuan beefing operations found primarily in western states (see Br. in Opp. at 17) to CWA permitting makes sense given the vast quantities of manure which they generate and which cannot be recycled. But that same concern does not implicate dairy farms like Southview, which can and do recycle their manure onto their own feed crop fields.

The regulatory exemption from CAFO designation for farms that grow crops over "any portion" of their facility is fully consistent with that policy concern. CAFOs are factories in the field and thus point sources; dairy farms like Southview devote large portions of their facility to growing feed crops and can thus internally accommodate their animal wastes.

3. Respondents imaginatively contend (at 16) that the term "lot or facility" in the regulatory definition of CAFO means the same thing as "confined area," so that EPA's substitution of the former (in its final regulations) for the latter (in its proposed regulations) means nothing. See 41 Fed. Reg. 11458 (1976). But the proposed regulations

certainly show that the agency knew how to say "area of confinement" when that is what it meant; by choosing the term "facility," it obviously meant something broader. *Cf. Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1448 (1994). In their ordinary, everyday senses, a dairy farm is a "facility" but not a "confined area," and a barn is a "confined area" but not a "facility." Southview, which produced 25,000 tons of crops and forage in 1992 (Am. Farm Bur. *Amicus* Br. at 13), unquestionably grows crops over a "significant portion" of its "facility" and therefore is not encompassed within the regulatory definition of CAFO.

Respondents (at 16) ascribe "no legal significance" to those many tons of crops because Southview's cows are not "pastured" in the crop fields. But dairy cows are *never* pastured in crop fields. As *amicus* State of New York explains (at 7):

> Corn stalks (corn is a typical animal feed on New York farms) averaging eight to ten feet when full grown, would ultimately be trampled by pasturing animals. It would also be impossible to separate the animal wastes from the crops, thereby preventing their use as animal feed.

Since, then, dairy cows can neither be pastured nor housed and fed (due to climactic conditions in the dairy belt) in crop fields, it would be impossible for any large dairy farm to satisfy respondents' construction of CAFO—unless it grew crops *in* its barns! This absurd result cannot possibly reflect the intent of Congress. *Cf. Public Citizen* v. *United States Dept. of Justice*, 491 U.S. 440, 454 (1989).

4. The CWA expressly exempts "agricultural stormwater discharges" from the definition of point source. 33 U.S.C. § 1362(14). Respondents seek to circumvent the fact that the alleged discharges on September 26 and April 15, made up of stormwater mixed with agricultural runoff, plainly fit within this exemption. They therefore urge (at 18-20) that the

exemption should apply only to "ordinary, natural" runoff, unmixed with pollutants. That would totally destroy the exemption, for such pure farm runoff is unlikely to exist in the real world of today. The EPA rule that permits are not required for "storm water runoff from * * * cultivated crops" (40 C.F.R. § 122.3) would similarly be rendered meaningless by respondents' purity requirement because cultivated crops are universally fertilized. Courts should not make decisions that render Congressional legislation and its implementing regulations meaningless. *Cf. John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989) (statutory provisions should not "be construed in a nonfunctional way").

Respondents also repeat (at 18) the court of appeals' contention that regardless of the statutory language, the real issue is whether the jury could have found that the discharges were the result of over-application of manure rather than of heavy rains. Pet. App. 14a. Not only do they ignore the two uncontroverted reports by New York state environmental officials that "heavy rain" "caused" the manure runoff (Pet. App. 30a), but also the jury's finding of no liability on the state negligence and nuisance claims (Pet. App. 23a)—a highly unlikely verdict if the jury had viewed the discharges as resulting from over-application.

5. Respondents' efforts to bring manure spreaders and swales within the definition of point source are equally unavailing.

There are approximately 200,000 manure spreaders in the United States, yet neither EPA nor any state agency has ever issued a pollution discharge permit for a single one. Equipment Mfrs. *Amicus* Br. at 8. The fact is that no one (until now) has ever considered manure spreaders to be point source activity requiring a permit. The court of appeals has now overturned this settled understanding. Such a wholesale

revision of agricultural regulation should come from Congress, not a court.[3]

Respondents defend the court of appeals' invention of a new category of point source—a "swale"—by observing (at 11) that the CWA includes the term "ditch" in its definition of point source. But, as the district court found on the basis of photographic evidence, there was no "ditch" in the field at issue but only some "low spots." Pet. App. 46.[4] Congress included "ditch" within the definition of point source because a ditch, like the other terms in the definition, is the result of human activity, not, like a swale, a natural formation.[5] See R. Beck, *Waters and Water Rights* 216-217 (1991) (a "man-induced gathering mechanism plainly is the essential characteristic of a point source"). Contrary to respondents' position, Congress could not have intended the federal government to monitor natural movements of pollutants into and out of every uneven section of farmland. The CWA is aimed at the more monitorable and deterrable targets of industrial and municipal waste.

6. Respondents, like the court of appeals, would like to override Congress and intrude extensive federal permitting into the daily routines of American farmers. They rely

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[3] EPA agrees that manure spreaders are not point sources under the CWA. *Guidance Manual on NPDES Regulations for Concentrated Animal Feeding Operations* 2 (draft) (1995). But, unless the court of appeals is reversed, manure spreaders are now point sources, at least in the Second Circuit.

[4] Nor, contrary to the assertions of respondents (at 5, 11) and the court of appeals (Pet. App. 9a), is there *anything* in the record to indicate that the swale was coupled with a pipe.

[5] See *Merriam Webster's Collegiate Dictionary* (10th ed. 1994) (defining "ditch" as an excavation "dug" in the earth, and "swale" as "a low-lying or depressed and often wet stretch of land").

heavily (at 10) on *Natural Resources Defense Council* v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977), which affirmed a district court's decision that Congress did not and EPA could not exempt most agricultural activities from the NPDES permitting program. But, astonishingly, respondents do not acknowledge that Congress was so appalled at the district court's decision in *Costle* that it responded by immediately amending three separate sections of the CWA, excluding "return flows from irrigated agriculture" from the definition of point source, exempting such return flows from the NPDES permit program, and assigning them instead to state and local regulators. See Pub. L. 95-217, 91 Stat. 1566 (1977). The Senate Report stressed that return flow pollutants, "regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(F)." S. Rep. No. 95-370, 95th Cong., 1st Sess. 35, reprinted in 1977 U.S.C.C.A.N. 4326, 4360 (referring to 33 U.S.C. § 1288, which delegates regulation of agriculturally related nonpoint source pollution to the states). Congress acted again in 1987 to reaffirm the unsuitability of federal permitting for agricultural runoff, expressly inscribing in the CWA that "[t]he term 'point source' * * * does not include agricultural stormwater discharges." 33 U.S.C. § 1362(14). The court of appeals' decision is an affront to these Congressional efforts to clarify that agricultural pollution is nonpoint source and appropriately regulated by state and local authorities.[6]

7. Finally, respondents fail to say anything at all about the damage done by the court of appeals' decision to the

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[6] *Costle* is thus bad law and inappropriately cited. The other cases relied on by plaintiffs (at 10-13) for their wildly expansive reading of "point source" either concern only industrial or municipal pollution or predate Congress's 1988 amendments expressly exempting agricultural stormwater discharges.

CWA's careful apportionment of regulatory responsibilities between the federal and state governments. In fact, they do not so much as mention sections 208 and 319 of the CWA, which assign to the states the regulatory authority over nonpoint sources of water pollution. *E.g.*, 33 U.S.C. § 1288(b)(2)(F) (requiring states to address agriculturally related nonpoint source pollution, including manure runoff). The CWA amendments of 1977 were expressly intended to encourage "the State[s] to assume more and more of the responsibilities of the water pollution program." S. Rep. No. 95-370, 1977 U.S.C.C.A.N. at 4357.

As *amicus* State of New York makes clear, the court of appeals' decision has thrown a wrench into the machinery of state regulation and is widely resented as an encroachment on a heretofore respected state preserve. This Court should grant Southview's petition to undo the incalculable damage being visited on farmers, the rural economy, and Congress's carefully considered regulatory blueprint for alleviating the dangers of water pollution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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